91-1959

Supreme Court, U.S.
FILED
JUN 1 1992
OFFICE OF THE CLERK

No. ________

In The

Supreme Court of the United States

October Term, 1991

◆

JIM ST. JOHN, CURTIS RENE PETERSON, AND
CINEMA BLUE OF CHARLOTTE, INC.,

Petitioners,

vs.

STATE OF NORTH CAROLINA PAROLE
COMMISSION, LOUIS COLUMBO, CHAIRMAN, and
JOHN PATSEAVOURAS, DIRECTOR OF THE STATE
OF NORTH CAROLINA PAROLE COMMISSION,

Respondents.

◆

**Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

KLEIN & SHAFER, P.C.
BRADLEY J. SHAFER*
P.O. Box 1426
Okemos, MI 48805-1426
517-349-8666
Attorney for Petitioners
*Counsel of Record

NELSON CASSTEVENS
602 East Morehead Street
Charlotte, NC 28202
704-372-2140
Co-counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. IN A CRIMINAL OBSCENITY PROSECUTION, DOES THE EXCLUSION OF ALL DEFENSE PROFFERED EVIDENCE AND TESTIMONY REGARDING "CONTEMPORARY COMMUNITY STANDARDS" AND THE NON-OBSCENITY OF THE CHARGED MATERIALS, INCLUDING METHODOLOGICALLY SOUND PUBLIC OPINION STUDIES OF THE RELEVANT COMMUNITY STANDARDS UTILIZING THE ACTUAL MATERIALS ALLEGED TO BE OBSCENE, VIOLATE A DEFENDANT'S RIGHT UNDER THE FIRST AMENDMENT TO ASSERT THE NON-OBSCENITY OF THE CHARGED MATERIALS, AND A DEFENDANT'S RIGHT TO PUT ON A DEFENSE PURSUANT TO THE SIXTH AND FOURTEENTH AMENDMENTS AND THIS COURT'S DECISIONS IN *KAPLAN V. CALIFORNIA*, 413 U.S. 115, 121 (1973), AND *HAMLING V. UNITED STATES*, 418 U.S. 87, 125 (1974), ALLOWING A DEFENDANT IN A CRIMINAL OBSCENITY PROSECUTION TO PRESENT "RELEVANT, COMPETENT EVIDENCE," AND "APPROPRIATE" EXPERT WITNESS TESTIMONY?

II. IN A CRIMINAL OBSCENITY PROSECUTION, WHAT IS "APPROPRIATE EXPERT TESTIMONY" PURSUANT TO THIS COURT'S DECISION IN *KAPLAN V. CALIFORNIA*, 413 U.S. 115, 121 (1973), AND WHAT IS "RELEVANT, COMPETENT EVIDENCE" PURSUANT TO THIS COURT'S DECISION IN *HAMLING V. UNITED STATES*, 418 U.S. 87, 125 (1974), SO THAT TOTAL EXCLUSION OF SUCH TESTIMONY AND EVIDENCE WOULD VIOLATE A DEFENDANT'S RIGHT UNDER THE

QUESTIONS PRESENTED – Continued

FIRST AMENDMENT TO ASSERT THE NON-OBSCENITY OF THE CHARGED MATERIALS, AND THE DEFENDANT'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENT TO PRESENT A DEFENSE?

III. DOES THE FIRST AMENDMENT REQUIRE, PURSUANT TO THIS COURT'S DECISION IN *MISHKIN V. NEW YORK*, 383 U.S. 502 (1966), THAT MATERIAL WHICH IS OF A SOLELY "DEVIANT" NATURE, THAT BEING THAT IT IS DESIGNED FOR AND PRIMARILY DISSEMINATED TO A SPECIFICALLY DEFINED "DEVIANT" SEXUAL GROUP, BE EVALUATED BY REFERENCE *ONLY* TO THE AVERAGE MEMBER OF THE "DEVIANT" SEXUAL GROUP, RATHER THAN THE ADULT COMMUNITY AT LARGE?

IV. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRE THAT THE JURY BE INSTRUCTED AS TO EACH ESSENTIAL ELEMENT OF THE ALLEGED CRIME OF DISSEMINATING OBSCENITY, INCLUDING A STATUTORY MANDATORY PROVISION THAT THE OBSCENITY OF "DEVIANT" MATERIALS SHALL BE JUDGED WITH REFERENCE TO INDIVIDUALS IN THAT SPECIFIC "DEVIANT" GROUP?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 10

- I. THE ISSUE OF WHAT EVIDENCE MAY BE RELEVANT TO AND ADMISSIBLE OF CONTEMPORARY COMMUNITY STANDARDS IN AN OBSCENITY PROSECUTION IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS AN ISSUE THAT HAS RESULTED IN CONFLICTING AND OPPOSING APPELLATE DECISIONS ACROSS THE COUNTRY 10
  - A. The Fourth Circuit decision, finding no constitutional violation in the exclusion at trial of virtually the totality of defense evidence and testimony, affronts the fundamental right to put on a defense under the Sixth and Fourteenth Amendments, as well as the right under the First Amendment to assert and to establish the non-obscenity of presumptively protected expression, and conflicts with numerous decisions of this Court, other circuit courts of appeals, and other state courts of last resort 10

TABLE OF CONTENTS – Continued

Page

B. Exclusion of proffered "comparison" evidence and testimony relating thereto illustrates the need for direction from this Court regarding evidence and testimony that is relevant to, and therefore admissible of contemporary community standards 20

II. THE DECISION OF THE FOURTH CIRCUIT, ALLOWING THE OBSCENITY OF "DEVIANT" MATERIAL TO BE DETERMINED BY REFERENCE TO THE AVERAGE PERSON IN THE COMMUNITY, IS IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS OF APPEALS, AND THE PLAIN LANGUAGE OF NUMEROUS STATE OBSCENITY STATUTES, INCLUDING THE NORTH CAROLINA OBSCENITY STATUTE CONTROLLING THIS STATE PROSECUTION. THE ISSUE OF THE PROPER "REFERENCE" GROUP FOR DECIDING THE OBSCENITY OF "DEVIANT" MATERIAL IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Armstrong v. Manzo, 380 U.S. 545 (1962) 11

Asaff v. Texas, 799 S.W.2d 329 (Tex. App. 1990) . . . 16, 17

California v. Green, 399 U.S. 149 (1970) 10

Caraffas v. LaVallee, 391 U.S. 234 (1968) 9

Carlock v. State, 609 S.W.2d 787 (Tex. Cr. App. 1980) 15, 19

Chambers v. Mississippi, 410 U.S. 284 (1973) 10, 11

Cinema Blue of Charlotte, Inc. v. Gilchrist, 704 F. Supp. 631 (W.D.N.C. 1989) 4

Cinema Blue of Charlotte, Inc. v. Gilchrist, 887 F.2d 49 (4th Cir. 1988), *cert. denied*, 494 U.S. 1030 (1990) 4

Commonwealth v. Mascolo, 386 N.E.2d 1311 (Mass. App. 1979) 17

Commonwealth v. Trainor, 374 N.E.2d 1216 (Mass. 1978) 6, 15, 17

Commonwealth v. United Books, 453 N.E.2d 406 (Mass. 1983) 15

Faretta v. California, 422 U.S. 806 (1975) 10

Flynt v. State, 264 S.E.2d 669 (Ga. App. 1980), *cert. denied*, 449 U.S. 888 (1980) 16, 17, 20, 22

Glenn v. Dallman, 686 F.2d 418 (6th Cir. 1982) 28

Goldberg v. Kelly, 397 U.S. 254 (1970) 10, 11

Page

Grannis v. Ordean, 234 U.S. 385 (1914) ... 11
Green v. Georgia, 442 U.S. 95 (1979) ... 11
Hamling v. United States, 418 U.S. 87 (1974) ... *passim*
Henderson v. Kibbe, 431 U.S. 145 (1977) ... 29
Hermann v. United States, 304 A.2d 22 (D.C. Cir. 1973) ... 15
Holland v. United States, 348 U.S. 121 (1954) ... 28
Jenkins v. McKeithen, 395 U.S. 411 (1969) ... 11
Kaplan v. California, 413 U.S. 115 (1973) .. 11, 13, 14, 18
Lakin v. United States, 363 A.2d 990 (D.C. 1976) ... 28
Maleng v. Cook, 490 U.S. 488 (1989) ... 9
McKinney v. Alabama, 424 U.S. 669 (1976) ... 19
Memoirs v. Massachusetts, 383 U.S. 413 (1966) ... 13
Miller v. California, 413 U.S. 15 (1973) .. 3, 13, 14, 24, 28
Mishkin v. New York, 383 U.S. 502 (1966) ... *passim*
Newman v. Connover, 313 F. Supp. 623 (N.D. Tex. 1970) ... 24
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973) ... 18, 19
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) ... 10
People v. G.I. Distributors, Inc., 228 N.E.2d 787 (N.Y. 1967) ... 28
People v. Nelson, 410 N.E.2d 476 (Ill. App. 1980) ... 15
People v. Spargo, 431 N.E.2d 27 (Ill. App. 2d Dist. 1982) ... 24

TABLE OF AUTHORITIES – Continued

Page

Pinkus v. United States, 436 U.S. 293 (1978) . 13, 21, 23, 27

Richards v. State, 461 N.E.2d 744 (Ind. App. 3d Dist. 1984) 16

Saliba v. State, 475 N.E.2d 1181 (Ind. App. 2 Dist. 1985) 6, 15, 17, 18, 22

Sedelbauer v. State, 455 N.E.2d 1159 (Ind. App. 3d Dist. 1983) 16

Sibron v. New York, 392 U.S. 40 (1986) 9

Smith v. California, 361 U.S. 147 (1959) 11, 18

Smith v. United States, 431 U.S. 291 (1977) 3

State v. Anderson, 354 S.E.2d 264 (N.C. App. 1987), *rev'd,* 366 S.E.2d 459 (1988), *cert. denied,* 488 U.S. 975 (1988) 3, 4, 6, 14, 17

State v. Barton, 344 N.E.2d 342 (Ohio App. 1975) 16

State v. Mayes, 323 N.C. 159, 371 S.E.2d 476 (1988), *cert. denied,* 488 U.S. 1009 (1989) 16, 17

State v. Short, 368 So. 2d 1078 (La. 1979) 21

State v. Urban, 798 S.W.2d 507 (Mo. App. 1990) 11

State v. Video Joe, Inc., 578 So. 2d 182 (La. App. 1991) 15

State ex rel. Pizza v. Strope, 560 N.E.2d 765 (Ohio 1990) 16

United States v. Arvin, 900 F.2d 1385 (9th Cir. 1990), *cert. denied,* 112 L.Ed.2d 664 (1991) 15

United States v. Cross, 928 F.2d 1030 (11th Cir. 1991) 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Hiscott, 586 F.2d 1271 (8th Cir. 1978) 28

United States v. Hutchinson, 338 F.2d 991 (4th Cir. 1964) 28

United States v. Levi, 153 F.2d 995 (3rd Cir. 1946) 28

United States v. Manarite, 448 F.2d 583 (2d Cir. 1971), *cert. denied*, 404 U.S. 947 (1971) 28

United States v. Palladino, 490 F.2d 499 (1st Cir. 1974) 27, 28

United States v. Petrov, 747 F.2d 824 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985) 21, 22, 27, 28

United States v. Pinkus, 579 F.2d 1174 (9th Cir. 1978), *cert. dismissed*, 439 U.S. 999 (1978) 21

United States v. Potomac News Company, 373 F.2d 635 (4th Cir. 1967), *rev'd*, 389 U.S. 47 (1967) 27

United States v. Pryba, 678 F. Supp. 1225 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990), *cert. denied*, 112 L.Ed.2d 258 (1990) 3, 4, 6, 14, 18

United States v. Sherpix, Inc., 512 F.2d 1361 (D.C. Cir. 1975) 17

United States v. Various Articles of Obscene Merchandise, Schedule No. 2102, 709 F.2d 132 (2d Cir. 1983) 21, 22

Ward v. Illinois, 431 U.S. 767 (1977) 24

Washington v. Texas, 388 U.S. 14 (1967) 10

TABLE OF AUTHORITIES – Continued

Page

Womack v. United States, 294 F.2d 204 (D.C. 1961), *cert. denied*, 365 U.S. 859 (1961) 21

Womack v. United States, 509 F.2d 368 (D.C. Cir. 1972), *cert. denied*, 422 U.S. 1022 (1975). 21, 22

UNITED STATES CONSTITUTIONAL PROVISIONS:

First Amendment 10, 20

Sixth Amendment 10

Fourteenth Amendment 10

SUPREME COURT RULES:

R. 29.1 3

R. 13.1 2

R. 13.4 2

UNITED STATES CODE:

28 U.S.C. § 1254 2

28 U.S.C. § 2101(c) 2

28 U.S.C. § 2241 2

28 U.S.C. § 2253 9

28 U.S.C. § 2254 2

42 U.S.C. § 1983 . . . . .2, 3, 8, 9

FEDERAL RULES:

F.R.A.P. 22(b) 9

F.R.E. 702 7

F.R.E. 403 7

TABLE OF AUTHORITIES – Continued

Page

NORTH CAROLINA STATUTES:

N.C.G.S. § 14-190.1 .... 2, 3, 7, 24, 27, 28

N.C.G.S. 8C-1

Rule 401 2

Rule 402 2

Rule 403 2

Rule 702 2

OTHER STATUTES:

Various State Obscenity Statutes 11, 12, 24, 25

OTHER AUTHORITIES:

Beckett & Bell, *Community Standards: Admitting a Public Opinion Poll Into Evidence in an Obscenity Case,* 84 No. 2 Case and Comment 18 (1979) 14

Brigman, *The Controversial Role of the Expert in Obscenity Litigation,* 7 Capital U. L. Rev. 519 (1978) 14

Glassman, *Community Standards of Patent Offensiveness: Public Opinion Data and Obscenity Law,* 42 Pub. Opinion Q. 161 (1978) 14

Lentz, *Comparison Evidence in Obscenity Trials,* 15 Michigan Journal of Law Reform 45 (Fall 1981) 22

Linz, *Estimating Community Standards: Use of Social Science Evidence in an Obscenity Prosecution,* 55 Public Opinion Quarterly 80 (1991) 6

Public Opinion Polls and Survey Evidence in Obscenity Cases, 15 Crim. L.Q. 135 (1973).......... 14

TABLE OF AUTHORITIES – Continued

Page

Opinion Polls and the Law of Evidence, 62 Va. L. Rev. 1101 (1976) 6

Schauer, *The Law of Obscenity* (1976) 14, 26, 27

Ziesler, *The Uniqueness of Survey Evidence,* 45 Cornell L.Q. 322 (1960) 6

No. ________

◆

In The

Supreme Court of the United States

October Term, 1991

◆

JIM ST. JOHN, CURTIS RENE PETERSON, AND
CINEMA BLUE OF CHARLOTTE, INC.,

Petitioners,

vs.

STATE OF NORTH CAROLINA PAROLE
COMMISSION, LOUIS COLUMBO, CHAIRMAN, and
JOHN PATSEAVOURAS, DIRECTOR OF THE STATE
OF NORTH CAROLINA PAROLE COMMISSION,

Respondents.

◆

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit**

◆

PETITION FOR A WRIT OF CERTIORARI

◆

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit United States Court of Appeals entered in this proceeding on January 29, 1992.

OPINIONS BELOW

The judgment and opinion of the United States District Court for the Western District of North Carolina, Charlotte Division, entered on May 2, 1991, is reported at 764 F. Supp. 403 (1991), and is reproduced as Appendix A. The March 2, 1992 summary per curiam opinion of the Fourth Circuit, affirming the opinion of the District Court, is an unpublished decision which is attached as

Appendix B. The order of the Fourth Circuit, denying rehearing and rehearing in banc, was filed March 2, 1992, and is reproduced as Appendix C. The opinion of the North Carolina Court of Appeals entered June 5, 1990 is reported at 392 S.E.2d 136 (1990), and can be found as Appendix D. Finally, the July 31, 1990 Order of the North Carolina Supreme Court denying a Petition for Discretionary Review and dismissing a Notice of Appeal, is an unreported decision and is attached as Appendix E.

JURISDICTION

The opinion of the Fourth Circuit was entered on January 29, 1992, with a timely filed Petition for Rehearing and Suggestion for Rehearing In Banc being denied on March 2, 1992. As this Petition is filed within ninety (90) days of that latter date, this Court has jurisdiction to review the decision of the Fourth Circuit pursuant to 28 U.S.C. § 1254, 28 U.S.C. § 2101(c) and Sup. Ct. R.'s 13.1 and 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the First, Sixth and Fourteenth Amendments to the United States Constitution, United States Code Sections 28 U.S.C. § 2241, 28 U.S.C. § 2254, and 42 U.S.C. § 1983, and North Carolina General Statutes (N.C.G.S.) § 14-190.1, and § 8C-1 Rules 401, 402, 403 and 702, are set forth in Appendix F.

STATEMENT OF THE CASE

Petitioners request this Court to review the decision of the Fourth Circuit affirming the opinion of the United States District Court for the Western District of North Carolina, Charlotte Division, which denied a request for federal habeas corpus relief pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254, and a request for analogous relief on the part of the corporate Petitioner pursuant to 42

U.S.C. § 1983, relating to state court prosecutions and convictions in North Carolina.

On September 26, 1988, Petitioner Cinema Blue of Charlotte, Inc. (hereinafter "Cinema Blue")[1] was indicted on numerous charges of disseminating obscenity in violation of N.C.G.S. 14-190.1, and of conspiring to disseminate obscenity, while Petitioners St. John and Peterson were indicted on numerous charges of being accessories before the fact to the dissemination of obscenity, and of conspiring to disseminate obscenity.

In defense of the charges against them, Defendants sought to undertake certain sociological studies of the "contemporary community standards" to determine whether, given those standards, the materials at issue fit the legal criteria of obscenity as set forth in N.C.G.S. § 14-190.1(b); *Miller v. California*, 413 U.S. 15 (1973); and *Smith v. United States*, 431 U.S. 291, 301 (1977). However, concern for the admissibility of such studies had been raised by a recent line of appellate decisions (one from the jurisdictionally relevant North Carolina Supreme Court) which had called into question the relevance and veracity of some surveys (such as telephone public opinion polls and ethnographic studies) as not being properly descriptive or representative of the materials alleged to be obscene. *See State v. Anderson*, 366 S.E.2d 459, 468 (N.C. 1988), *cert. denied*, 488 U.S. 975 (1989); and *United States v. Pryba*, 678 F. Supp. 1225, 1229-1230, 1233 (E.D. Va. 1988), *aff'd*, 900 F.2d 748 (4th Cir. 1990), *cert. denied*, 112 L.Ed.2d 258 (1990).

To control for these concerns, Petitioners' experts proposed to conduct a study utilizing the *actual materials alleged to be obscene*, not only to obtain responses from a random sample of the community relating specifically to those materials at issue, but also to validate descriptive language of those materials to be contained in an intended telephone survey. Direction for conducting such a study was provided not only by *Anderson* and *Pryba,* but also by the North Carolina Court of Appeals decision in *State v. Anderson,* 354 S.E.2d 264 (N.C. App. 1987), *rev'd on other grounds, Anderson,* 366 S.E.2d at 459, wherein that court stated that the *best way* for an expert "to determine the impact of these [materials] on the average person in the community is to *go throughout the community showing these [materials] to various randomly selected adult community residents.*" *Id.*, at 268-269 (clarification and emphasis added).

---

[1] Cinema Blue of Charlotte Inc. has no parent companies or subsidiaries to list pursuant to Sup. Ct. R. 29.1.

However, when informed of the prospect of the conducting of such a study, the state prosecuting attorney threatened to prosecute the expert witnesses for dissemination of obscenity, which resulted in the filing for and granting of a federal injunction, after analogous relief had been denied by the state court. See *Cinema Blue of Charlotte, Inc. v. Gilchrist,* 704 F. Supp 631 (W.D.N.C. 1989). The studies for the defense were then conducted, although they were terminated early when the Fourth Circuit stayed, and then later reversed the decision of the federal district court on *Younger* abstention grounds. 887 F.2d 49, 52 (4th Cir. 1988), *cert. denied,* 494 U.S. 1030 (1990). However, sufficient data had been obtained by that time for the expert witnesses to be able to render opinions of the relevant community standards as well as the obscenity of the charged materials.

At trial, following both court ordered and voluntary dismissal of several counts regarding different materials, the jury was left to consider the obscenity of three videotapes and one magazine. The state's evidence as to the obscenity of these materials consisted of their admission into evidence and nothing else.

The intended defense primarily consisted of the proffered testimony of five expert witnesses: Dr. John Reed, a Professor of Sociology and director of the Institute for Research and Social Science at the University of North Carolina, Chapel Hill, and a Presidential appointee (by President Reagan) to the National Counsel for the

Humanities; Dr. Edward Donnerstein, Professor and Chairman of the Communications Department at the University of California, Santa Barbara, who is the top researcher in the country regarding the effects of sexually explicit material, who was the lead-off social science witness before the Attorney General's Commission on Pornography, and who was also a member of the United States Surgeon General's Workshop on Pornography; Dr. Larry Lance, an Associate Professor of Sociology at the University of North Carolina, Charlotte; Dr. Joseph Scott, an Assistant Professor of Sociology at Ohio State University who has conducted numerous studies for obscenity prosecutions and who has authored a number of articles on evidence in obscenity prosecutions; and Dr. Kenneth Land, Professor and Chairman of the Department of Sociology at Duke University, who is one of the nation's top mathematical sociologists and who regularly consults for the United States Government. For purposes of the proffer (conducted outside of the presence of the jury), all of these Professors were *stipulated by the State of North Carolina* to be experts in their respective fields.

These experts testified during proffer that, depending upon their respective role, they had either designed, and/or supervised, and/or conducted, and/or reviewed, and/or critiqued, and/or analyzed various studies of the community standards in Mecklenburg County, in order to determine whether or not the charged materials were, given those standards, in fact, obscene. These studies included a telephone survey of 407 randomly selected adult respondents, a "film evaluation study" in which 129 randomly selected adults from Mecklenburg County actually viewed the materials alleged to be obscene and responded to a number of questions as to the prurient appeal and patent offensiveness of such materials,[2] and a second telephone survey consisting of the responses of 200 randomly selected individuals who had rented adult materials from Defendant Cinema Blue.

---

[2] The "sample size" of the film evaluation study would have been larger, but for the threats of prosecution and the stay by the Fourth Circuit of the injunctive relief. Dr. Land testified, however, that sufficient data had been obtained to render this study reliable, and this testimony was unrefuted.

The unrefuted testimony of Defendants' experts confirmed that proper methodology had been utilized for each study (using such state-of-the-art procedures as control groups and tests for bias), that representative samples of the population had been obtained, that the results were trustworthy, and that the description of the material as contained in the telephone surveys was properly representative of the materials at issue, thereby allaying the concerns noted in *Anderson* and *Pryba.*[3]

---

[3] Although the propriety of the methodologies employed in these studies was questioned neither in the trial nor state appellate courts, the validity of the procedures used can be verified from at least three different sources. First, the methodologies are set out in great detail in the "Final Report" of those studies, proffered into evidence, which is attached as Appendix G (in the interest of brevity, irrelevant or repetitious materials are deleted from that report). Comparison of those procedures to the various appellate decisions and legal commentary that have outlined the foundational criteria for the admission of such evidence will substantiate the propriety of the procedures used. *See, for example, Saliba v. State,* 475 N.E.2d 1181 (Ind. App. 2 Dist. 1985); *Commonwealth v. Trainor,* 374 N.E.2d 1216 (Mass. 1978); *Opinion Polls and the Law of Evidence,* 62 Va. L. Rev. 1101 (1976), at 1123-1132; and Zeisler, *The Uniqueness of Survey Evidence,* 45 Cornell L.Q. 322 (1960). Second, Dr.'s Reed and Land both testified that rather than having taken part in the conducting of these studies, they had acted as "devil's advocates" to critique the methodologies employed, and had found no problems. Third, the propriety of the methodologies employed is further confirmed by the publication of these studies in a peer-reviewed journal. *See* Linz, *Estimating Community Standards: Use of Social Science Evidence in an Obscenity Prosecution,* 55 Public Opinion Quarterly 80 (1991). This article will be filed with this Court's library for review in these proceedings.

Based upon these studies, Dr.'s Donnerstein (designer of the film evaluation study) and Scott (who conducted the telephone surveys) testified that the average adult in Mecklenburg County, applying contemporary community standards, would not find the materials in question either appealing to the prurient interest or to be patently offensive.[4] The trial court, although finding these studies relevant to at least one issue to be decided by the trier of fact (he did not indicate which one), however, excluded them in their entireties, as well as *all* of the expert testimony, by conclusorily noting (without any specific findings) that, pursuant to state evidence rule 702 (virtually identical to F.R.E. 702), this evidence would be of *no assistance* to the trier of fact, and that, pursuant to rule 403 (identical to F.R.E. 403), any probative value would be outweighed by its prejudice. Appendix H.

In addition, Defendants proffered testimony regarding certain "comparable" materials available and regularly sold and rented in the community, and further proffered three such materials into evidence, together with lists of the number of times each such film had been rented at Cinema Blue, a map of the community showing where renters of such films resided in the community, and testimony regarding how all this evidence was relevant to determining community standards, and thus the obscenity of the charged materials. The trial court excluded this evidence (except for the map) and testimony as well for the same reasons, and for the additional reason that the court found the proffer of the comparison evidence to be "cumulative."[5] Appendix I.

---

[4] One film at issue ("Video Games") was not included in the film evaluation study, or these conclusions, as being a gay film, it was to be judged, pursuant to statute, not by the average adult, but by the average adult homosexual. *See* N.C.G.S. 14-190.1(d); *Mishkin v. New York,* 383 U.S. 502, 508-509 (1966), and discussion, *infra.*

Following the exclusion of virtually the entire defense, the jury returned findings of obscenity as to the films "Video Games" and "Review," but found another film ("The Big Switch") and a magazine ("Pregnant and Sexy") not to be obscene. St. John and Peterson were each found guilty of two counts of accessory before the fact to the dissemination of obscenity, and one count of conspiracy to disseminate obscenity, and Cinema Blue was convicted of two counts of dissemination of obscenity, and one count of conspiracy to disseminate obscenity. St. John and Peterson were sentenced to imprisonment of two years per count (a total of six years each), and Cinema Blue was fined $150,000.00.

Petitioners timely appealed to the North Carolina Court of Appeals, which on June 5, 1990, affirmed the convictions without elaborating on the federal constitutional issues that had been raised. App. D. The North Carolina Supreme Court dismissed a timely filed Notice of Appeal, and denied a Petition for Discretionary Review, without comment, in an Order entered July 31, 1990 (App. E), with this Court subsequently denying a Petition for a Writ of Certiorari. 112 L.Ed.2d 1042 (1991).

Prior to the filing of that Petition, Defendants had filed a Petition for a Writ of Habeas Corpus and a Complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of North Carolina, Charlotte Division, which was held in abeyance pending resolution by this Court. Following this Court's denial of direct review, Peterson and St. John were incarcerated in

---

[5] The trial court did not indicate of what this evidence would have been cumulative, and this conclusion is suspect given the fact that virtually the entirety of the proffered defense was excluded.

State prison, and the federal collateral proceedings in the district court then commenced.

However, prior to the district court entering a decision on that action, Peterson and St. John were paroled from prison.[6] On May 2, 1991, the district court granted, without oral argument or evidentiary hearing, the Respondent's Motion for Summary Judgment, and dismissed the combined Petition for a Writ of Habeas Corpus and civil action pursuant to 42 U.S.C. § 1983, with prejudice, issuing both a Judgment and a Memorandum of Decision and Order. App. A. Following the filing of a Notice of Appeal to the Fourth Circuit, the district court issued a Certificate of Probable Cause pursuant to 28 U.S.C. § 2253 and F.R.A.P. 22(b) to allow an appeal to be taken. On January 29, 1992, the Fourth Circuit, in a summary per curiam opinion, affirmed the district court's opinion. App. B. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied by the Fourth Circuit on March 2, 1992 (App. C), with the mandate of the Fourth Circuit issuing on March 9, 1992. This Petition follows.

---

[6] This release from prison on parole does not, however, moot the request for habeas corpus relief, nor the Petitioners' appellate remedies. *Caraffas v. LaVallee*, 391 U.S. 234, 237-240 (1968); *Sibron v. New York*, 392 U.S. 40, 50, 54-58 (1986); and *Maleng v. Cook*, 490 U.S. 488 (1989).

REASONS FOR GRANTING THE WRIT

I.

THE ISSUE OF WHAT EVIDENCE MAY BE RELEVANT TO AND ADMISSIBLE OF CONTEMPORARY COMMUNITY STANDARDS IN AN OBSCENITY PROSECUTION IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE SETTLED BY THIS COURT, AND IS AN ISSUE THAT HAS RESULTED IN CONFLICTING AND OPPOSING APPELLATE DECISIONS ACROSS THE COUNTRY.

A. The Fourth Circuit decision, finding no constitutional violation in the exclusion at trial of virtually the totality of defense evidence and testimony, affronts the fundamental right to put on a defense under the Sixth and Fourteenth Amendments, as well as the right under the First Amendment to assert and to establish the non-obscenity of presumptively protected expression, and conflicts with numerous decisions of this Court, other circuit courts of appeals, and other state courts of last resort.

The confrontation and compulsory process clauses of the Sixth Amendment constitutionalize "the right in an adversarial criminal trial to make a defense as we know it." *Faretta v. California,* 422 U.S. 806, 818 (1975), citing *California v. Green,* 399 U.S. 149, 176 (1970) (Harlan, J., concurring). Thus, a defendant in a criminal prosecution has the right, at a minimum, to "put before the jury evidence that might influence the determination of guilt." *Pennsylvania v. Ritchie,* 480 U.S. 39, 56 (1987). "Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi,* 410 U.S. 284, 302 (1973). This right is so fundamental that it has been implicitly incorporated into the due process clause of the Fourteenth Amendment. *Chambers,* 410 U.S. at 294; and *Washington v. Texas,* 388 U.S. 14, 19 (1967). "The fundamental requisite of due process is the opportunity to be heard", *Goldberg v. Kelly,* 397 U.S. 254, 267

(1970), citing *Grannis v. Ordean,* 234 U.S. 385, 394 (1914), a right that must be given "at a meaningful time and in a meaningful manner." *Goldberg,* 397 U.S. at 267, citing *Armstrong v. Manzo,* 380 U.S. 545, 552 (1962). This right becomes "particularly fundamental" when the questioned trial results in a guilty finding. *Jenkins v. McKeithen,* 395 U.S. 411, 429 (1969). In addition, evidence rules cannot be mechanistically utilized so as to deprive a defendant of this fundamental right to present a defense. *Chambers,* 410 U.S. at 302; and *Green v. Georgia,* 442 U.S. 95 (1979).

These constitutional concerns are no less applicable to one charged with violating the obscenity laws. As noted by (now Chief) Justice Rehnquist:

> "The defendant in an obscenity prosecution, just as a defendant in any other prosecution, is entitled to an opportunity to adduce *relevant, competent evidence* bearing on the issues to be tried." *Hamling v. United States,* 418 U.S. 87, 125 (1974) (emphasis added).

It is of no constitutional import that this "relevant" evidence may be in the form of expert witness opinion testimony, for the defendant in such a prosecution should be afforded an opportunity to "introduce *appropriate* expert testimony . . . ". *Kaplan v. California,* 413 U.S. 115, 121 (1973), citing *Smith v. California,* 361 U.S. 147, 164-165 (1959) (Frankfurter, J., concurring) (emphasis added).[7]

---

[7] Indeed, the importance of expert testimony in a criminal obscenity matter is so fundamental that numerous states statutorily command that evidence (including expert testimony) *shall* be admissible on some or all of the issues involved in the determination of obscenity. *See* Cal. Code § 312.1; Conn. Gen. Stat. § 53a-204; Ill. Ann. Stat. Ch. 38 para. 11-20(c); Mo. Ann. Stat. § 573.050 [.1 (evidence admissible on prurient appeal and patent offensiveness) and .2 (expert testimony); *but see State v. Urban,* 798 S.W.2d 507, 516-517 (Mo. App. 1990)]; Mont. Code

(Continued on following page)

Yet, while unequivocally indicating the constitutional right of a defendant in a criminal obscenity prosecution to introduce "appropriate" expert testimony or "relevant" evidence, this Court has never facially addressed the issues of what is "appropriate" expert testimony or "relevant" evidence in an obscenity prosecution (or, more importantly, what testimony and evidence is so *inappropriate* or so *irrelevant* that complete exclusion of it does

---

(Continued from previous page)

Ann. § 45-8-201(3)(a) and (c) [prurient appeal and patent offensiveness]; Neb. Rev. Stat. § 28-814(3) [expert testimony on "such issue" as to value]; N.H. Rev. Stat. Ann. § 650:5 (I)-(VI) [prurient appeal, patent offensiveness, and expert testimony "relating to factors entering into determination of the issue of obscenity"]; Okla. Stat. Ann. tit. 21 § 1040.18(b) [in actions by the attorney general of the state to adjudicate the obscenity of mailable material to be made without a jury, the court "shall" receive evidence at trial including the testimony of experts pertaining, but not limited to prurient appeal and serious value]; and Va. Code Ann. § 18.2-384(8) [court *shall* receive evidence, including testimony of experts, pertaining to value and patent offensiveness of the material or similar materials]. On the other hand, Iowa indicates that a court "may" consider and receive into evidence expert testimony (Iowa Code § 728.9), while Idaho indicates that no one is *required* to put on expert evidence in an obscenity prosecution (Idaho Code § 18-4110). *See also,* Utah Code Ann. § 76-10-1203(3) [same as Idaho]. Surely, however, the constitutional right to put on a defense in a criminal obscenity prosecution cannot be limited to only these states that statutorily allow for the admission of such evidence. Yet, indicative that the admissibility of expert testimony is an area that is unclear is the fact that while South Carolina statutes previously commanded the admission of evidence regarding prurient appeal, patent offensiveness and serious value, as well as expert testimony (S.C. Code Ann. § 16-15-280), the South Carolina obscenity statute was recently amended which repealed that section. *See* 1987 Act No. 168, § 2, effectively October 1, 1987.

not constitute a denial of constitutional rights). This Court has peripherally noted the admissibility of expert witness testimony in criminal obscenity prosecutions in a number of its opinions,[8] but has never fully addressed either this evidentiary issue, or the interplay between such evidentiary exclusions and the constitutional rights not only under the Sixth and Fourteenth Amendments to put on a defense, but also under the First Amendment to argue and to establish *by evidence* the non-obscenity of presumptively protected expression.

It seems clear, however, from the prior decisions of this Court, that expert testimony regarding community standards, particularly that of survey research evidence, is relevant to and admissible in an obscenity prosecution.[9] Legal commentary on this issue similarly

---

[8] *See, for example, Memoirs v. Massachusetts,* 383 U.S. 413, 415 (1966); and n.9, *infra.*

[9] *See, for example, Miller,* 413 U.S. at 31 [allowing in, on behalf of the prosecution, expert witness evidence of an "extensive state-wide survey" of the contemporary community standards]; *Kaplan,* 413 U.S. at 117, 121 [prosecution expert testimony as to "prurient interest", "contemporary standards" and "patent offensiveness"]; *Hamling,* 418 U.S. at 100, 108-110 [admitting expert witness testimony both on behalf of the prosecution and the defendant, and finding no reversible error in excluding a community standards survey for the sole reason that it had measured the wrong "community"]; *Pinkus v. United States,* 436 U.S. 293, 296 (1978) ["The defense consisted of expert testimony and surveys offered to demonstrate that the materials did not appeal to the prurient interest, were not in conflict with community standards, and had redeeming social value."]; and *Smith v. California,* 361 U.S. at 164-165 (Frankfurter J., concurring)[discussing the necessity of allowing the defendant to put on evidence of community standards through

(Continued on following page)

supports the admissibility of public opinion surveys and expert testimony in order to enlighten the trier of fact regarding the prevailing contemporary community standards.[10]

But lack of direction from this Court has resulted in appellate decisions across this country reaching conflicting and often-times opposite conclusions, and have put obscenity defendants in the unenviable Catch-22 position as is found here. While some decisions mandate preclusion of studies of the contemporary community standards because such research assertedly did not specifically relate to or utilize the actual materials alleged to be obscene (as in *Pryba,* and *Anderson*), if a criminal defendant (or an expert witness), however, attempts to control for this perceived failing, and thereby utilizes the actual materials alleged to be obscene in a study, that defendant or expert could be threatened with prosecution, as in the case here, or even charged with dissemination of obscenity.

(Continued from previous page)

qualified experts, and cited for approval in *Kaplan,* 413 U.S. at 121].

[10] *See, for example,* Glassman, *Community Standards of Patent Offensiveness: Public Opinion Data and Obscenity Law,* 42 Pub. Opinion Q. 161 (1978); Beckett & Bell, *Community Standards: Admitting a Public Opinion Poll Into Evidence in an Obscenity Case,* 84 No. 2 Case and Comment 18 (1979); and Brigman, *The Controversial Role of the Expert in Obscenity Litigation,* 7 Capital U. L. Rev. 519 (1978). *See also* Schauer, *The Law of Obscenity,* (1976), at 134-135 [stating that a survey of "community views, *either as to the subject material itself, or as to material of that type generally, should be admissible on the issue of community standards,* and in fact the Supreme Court on two occasions has indicated that such evidence would be proper," citing *Miller,* 413 U.S. at 31 n.12; *Hamling,* 418 U.S. at 108 n.10; and *Public Opinion Polls and Survey Evidence in Obscenity Cases,* 15 Crim. L.Q. 135 (1973)].

In addition, the opinion reached by the trial court below (that such evidence and testimony would *not be of assistance* to the trier of fact), illustrates the effect of lack of direction from this Court, since many appellate decisions reach quite an opposite conclusion.[11] Yet, this

---

[11] *See, for example, Commonwealth v. United Books*, 453 N.E.2d 406, 411-413 (Mass. 1983) ["[I]t would be a *rare case* in which testimony from a qualified expert should be excluded on the ground that it *would not be helpful* to the trier of fact." *Id.*, at 412, citing *Trainor*, 374 N.E.2d 1216]; *Saliba*, 475 N.E.2d at 1185 [the seminal case setting forth the foundational criteria for the admission of a public opinion poll in a criminal obscenity prosecution, holding such evidence to be *"uniquely suited"* to the determination of contemporary community standards]; *Carlock v. State*, 609 S.W.2d 787, 788-789 (Tex. Cr. App. 1980) [holding public opinion surveys of the contemporary community standards to be *"clearly relevant"* as to the determination of the material facts in issue, finding that such evidence *would, indeed, "assist the jury,"* and rejecting an argument that the trial court could properly exclude such evidence in the exercise of judicial discretion]; *People v. Nelson*, 410 N.E.2d 476, 479 (Ill. App. 1980) [holding that survey results are *"strong evidence"* of the community standards and "may be the only way to prove degrees of acceptability . . . "]; *Hermann v. United States*, 304 A.2d 22, 25 (D.C. Cir. 1973) [although deciding the issue, not raised here, of whether or not the prosecution is *required* to present expert evidence as to the obscenity of the material, noted that "expert testimony would often *substantially assist* trial court determinations regarding obscenity . . . "]; *State v. Video Joe, Inc.*, 578 So. 2d 182, 185 (La. App. 1991) [finding a prosecution witness's testimony as to "prurient interest" to be within the limits of proper expert testimony under a similar state rule of evidence]; *United States v. Arvin*, 900 F.2d 1385, 1388-1390 (9th Cir. 1990), *cert. denied*, 112 L.Ed.2d 664 (1991) [holding that expert testimony regarding "community standards," "prurient interest," and "patent offensiveness" would be relevant to a determination of obscenity and would be of assistance to the jury, although affirming the exclusion of such evidence in that case since the material at issue there, child

(Continued on following page)

confusion has led a few courts to hold that total exclusion of a defendant's evidence regarding the non-obscenity of material is not a violation of constitutional rights[12], while at least one federal court of appeals (in direct conflict to the Fourth Circuit decision here) has held (although

---

(Continued from previous page)

pornography, did not have to be found to be " obscene" to result in conviction]; *United States v. Cross,* 928 F.2d 1030, 1049-1051 (11th Cir. 1991) [holding a prosecution expert witness's testimony regarding the obscene nature, sexual appeal, and marketability of certain materials to be *"of considerable probative value* in proving each of the charges contained in the indictment."]; and *State v. Barton,* 344 N.E.2d 342, 350-351 (Ohio App. 1975) [holding it error to "deny or unreasonably curtail" a defendant's right in an obscenity case to put on a defense]. Of particular interest here are two additional appellate decisions that discussed community standard surveys that had been conducted by one of the experts here; Dr. Joseph Scott. In *Asaff v. Texas,* 799 S.W.2d 329 (Tex. App. 1990), *review refused,* the Texas Court of Appeals concluded that it was *reversible error* to have excluded an almost identical study that Dr. Scott had performed for the defense of these Petitioners. In addition, in the case of *State ex rel. Pizza v. Strope,* 560 N.E.2d 765, 770 (Ohio 1990), the Ohio Supreme Court, in citing the Ohio Court of Appeals decision in that matter, noted that a (again) similar survey by Dr. Scott was the *"most relevant and probative evidence presented"* on the issue of the obscenity of the charged materials. *See also,* the jurisdictionally relevant decision of *State v. Mayes,* 371 S.E.2d 476 (N.C. 1988), *cert. denied,* 488 U.S. 1009 (1989) [which, although holding it to be error to have excluded the testimony regarding a Dr. Terry Cole who had conducted a study of the contemporary community standards, held such exclusion to be harmless error since similar evidence and testimony had come in from another expert witness].

[12] *See, for example; Sedelbauer v. State,* 455 N.E.2d 1159, 1164 (Ind. App. 3d Dist. 1983); *Flynt v. State,* 264 S.E.2d 669, 672 (Ga. App. 1980), *cert. denied,* 449 U.S. 888 (1980); and *Richards v. State,* 461 N.E.2d 744, 747-748 (Ind. App. 3d Dist. 1984).

acknowledging the wide discretion of a trial court in admitting or excluding such evidence) that it is inappropriate to summarily exclude *all* testimony on community standards.[13]

Disparity can also be found in the decisions of various appellate courts regarding the propriety (i.e., relevance) of the questions themselves as contained in certain community standards surveys.[14] The questions utilized in the studies here, however, directly derived from not only questions that had been found to be allowable, and thus relevant, by the North Carolina Supreme Court in *Anderson* and *Mayes*, as well as in the Indiana decision of *Saliba*, but also included additional questions that specifically related to the legal tests of prurient appeal and patently offensive as defined by this Court.[15]

---

[13] *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1372 (D.C. Cir. 1975).

[14] *Compare, for example,* the survey questions found to be excludable in *Anderson*, 366 S.E.2d at 467-468; *Mayes*, 359 S.E.2d at 35-36; and *Flynt*, 264 S.E.2d at 672, but which were found to be relevant and admissible in such cases as *Asaff*, 799 S.W.2d at 331-334; and *Strope*, 560 N.E.2d at 766. On the other hand, certain other questions that were excluded in *Flynt* (at 672) were, however, found to be relevant and admissible in *Mayes* (at 35-36); *Anderson* (at 467-468); and *Nelson*, 410 N.E.2d at 480. *Compare also* the exclusion of questions in *Flynt* and *Commonwealth v. Mascolo*, 386 N.E.2d 1311, 1314 (Mass. App. 1979) with the propriety of such questions noted in *Saliba*, 475 N.E.2d at 1185-1186. *Compare also Saliba*, 475 N.E.2d at 1186 ["We must emphasize the majority of the community need not desire to view sexually explicit materials in order to establish community acceptance or tolerance of such materials."]; and *Nelson*, 410 N.E.2d at 478 [question of whether individuals feel "it would be acceptable to the average adult in Illinois to see or buy sexually explicit materials" held to be relevant to the "acceptance" of such material] *with Trainor*, 374 N.E.2d at 1222 ["Perhaps many people would not object to others seeing such material, although they themselves regard such material as patently offensive."]; and *Flynt*, 264 S.E.2d at 672 [same].

Review of these decisions illustrates the confusion that has reigned regarding this issue since 1973 when this Court set forth a criminal defendant's right to introduce "appropriate" expert testimony in *Kaplan*, but at the same time, indicated in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 (1973), that the prosecution need not put on any form of affirmative expert evidence regarding the obscenity of the material, as, this Court concluded, no such assistance is needed by the trier of fact once the materials themselves are placed into evidence. Further compounding this problem was this Court's indication at footnote six in *Paris Adult* of seeming disapproval of the use of expert witness testimony in this area of the law, while at the same time, citing, in *Kaplan*, to Justice Frankfurter's concurring opinion in *Smith v. California*, where Justice Frankfurter had indicated that community standards "can as a matter of fact hardly be established *except through experts.*" *Smith*, 361 U.S. at 165 (emphasis added).

While some courts and statutory commentary have recognized the critical distinction between *Paris Adult* and *Kaplan* (i.e., the implications raised of due process and Sixth Amendment violations by exclusion of a *criminal defendant's* evidence, as opposed to the evidentiary burden of the prosecution),[16] many courts have taken direction solely from *Paris Adult* and have concluded that notwithstanding a criminal defendant's constitutional right to put on a defense, a trial court has *unlimited* discretion in excluding such evidence. The case at issue is a prime example of this problem, illustrated by the fact that while the Fourth Circuit, in its first decision regarding this state criminal prosecution, concluded that the then proposed film evaluation study was *"obviously critical evidence,"* 887 F.2d at 53, it however summarily concluded in its habeas review that no constitutional violation had occurred as a result of the total exclusion of this defense proffered evidence.

---

[15] *See, for example,* the final report of the studies, Appendix G, Tables 4, and 4a, Questions 12, 13 and 14; Tables 8, 8a and 9, Questions 9, 10, 11, and 12; and Tables 7, 7a and 8, Questions 4 and 5. Questions regarding the "tolerance" of such materials in determining the contemporary community standards were required as such a standard is mandated pursuant to North Carolina Pattern Jury Instruction (N.C.P.I.) 238.10, which the trial court, in a pretrial matter, had indicated it would be charging to the jury. In addition, the studies here also utilized questions that the *Pryba* court indicated would have been relevant, had they been asked in the studies at issue there. *Compare* App. G, Table 4, Q. 12, with *Pryba*, 678 F. Supp. 1230, n.7, citing *Saliba*, 475 N.E.2d at 1186, 1191 (although substituting an "acceptance" standard with "tolerance" as is mandated in North Carolina).

In addition to implicating Sixth and Fourteenth Amendment rights, the exclusion of the totality of the defense below, thereby precluding the ability to assert the non-obscenity of the materials at issue, surely implicates First Amendment concerns as well. This Court has long recognized that procedures by which a state ascertains whether certain materials are obscene must be ones that insure "the necessary sensitivity to freedom of expression." *McKinney v. Alabama*, 424 U.S. 669, 673-674 (1976). Analogous to the situation in *McKinney* where there was literally no ability to challenge a charge of obscenity of the materials, here there was no *meaningfully* ability to litigate the obscenity *vel non* of the charged materials. The Defendants here were basically required to sit on their hands and watch the trial go by.

This case, where the trial court summarily and without elaboration excluded landmark research which had specifically addressed all methodological and legal concerns, presents this Court with an ideal opportunity to address these highly confused areas of First Amendment jurisprudence. If a study utilizing the actual materials alleged to be obscene is not admissible in a criminal prosecution, it would appear that nothing is, and that there is therefore no real right to challenge, through testimony and evidence, the charge that certain material is obscene.

---

[16] *See, for example, Barton*, 344 N.E.2d at 350-351; *Carlock*, 609 S.W.2d at 789; and Mo. Ann. Stat. § 573.050, Comment to 1973 Proposed Code ["Thus, while the state does not have to use expert testimony, the defense should be free to use it. The state, of course, should also be free to use expert testimony"].

The hodgepodge of decisions as set forth above clearly illustrates that, because of lack of direction from this Court, there is no consensus as to what evidence and testimony (or, indeed, what questions in a study) might be relevant to the issue of contemporary community standards, and thus may "assist" the trier of fact in an obscenity prosecution. This has resulted in admission or exclusion of such evidence being purely arbitrary. With some courts finding various questions and studies to be relevant and to provide assistance to the trier of fact, and other courts finding the *exact same* questions and studies irrelevant and of no assistance, the need for direction from this Court is apparent.

B. Exclusion of proffered "comparison" evidence and testimony relating thereto illustrates the need for direction from this Court regarding evidence and testimony that is relevant to, and therefore admissible of contemporary community standards.

As stated by the Georgia Court of Appeals:

> "The rationale behind the admission of 'comparative' evidence is to allow the defendant in an obscenity case the opportunity to attempt to persuade the trier of fact that the challenged material does not exceed contemporary community standards, as represented by the comparable material and against which the challenged material is judged. The comparative material is tangible evidence of contemporary community standards." *Flynt*, 264 S.E.2d at 674.

This Court has noted, however, that the mere *availability* of similar material "does not *automatically*" make them admissible as tending to prove the non-obscenity of materials charged. *Hamling*, 418 U.S. at 125 (emphasis added). Yet, this Court has never addressed what circumstances would provide sufficient and adequate foundation for the admission of such evidence. While raised in *Pinkus*, 436 U.S. at 304-305, the disposition of that case did not require this Court to address this highly litigious "obscenity" issue. Upon remand by this Court, the Ninth Circuit, however, noted that the admission of comparison evidence has been "a subject of confusion," and that "[a]dmittedly, this is a difficult area and the standards are *ill-defined*". *United States v. Pinkus*, 579 F.2d 1174, 1175 (9th Cir. 1978), *cert. dismissed*, 439 U.S. 999 (1978) (emphasis added).

The "foundational requirements" for admission of comparison evidence is generally considered to be the two-part test as set forth in *Womack v. United States*, 294 F.2d 204 (D.C. Cir. 1961), *cert. denied*, 365 U.S. 859 (1961), which requires that the proffered comparison evidence: (1) is similar to the material at issue, and (2) possesses a reasonable degree of community acceptance.[17]

Historically, the second foundational criteria has proven troublesome.[18] As noted by the Second Circuit:

---

[17] Many courts, however, have discussed this second prong as requiring a showing of either acceptance, *or toleration*, for such materials. *See, for example, Womack v. United States*, 509 F.2d 368, 379 (D.C. Cir. 1972), *cert. denied*, 422 U.S. 1022 (1975); *State v. Short*, 368 So. 2d 1078, 1082 (La. 1979); *United States v. Petrov*, 747 F.2d 824, 831 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985); and *United States v. Various Articles of Obscene Merchandise, Schedule No. 2102*, 709 F.2d 132, 136-137 (2d Cir. 1983).

[18] Satisfaction of the first foundational requirement, "similarity", was fulfilled by Dr. Scott's proffered testimony that he had reviewed both the comparison evidence and the materials alleged to be obscene and found them to be comparable; i.e., they had the same type of graphic depictions and the same types of sexual conduct.

> "Of course, a determination of the precise point at which a publication is *so widely sold and is so generally available* in the community as to warrant a finding of community acceptance *is difficult to fix with assurance.*" *Womack v. United States,* 509 F.2d 368, 379 (D.C. Cir. 1972), *cert. denied,* 422 U.S. 1022 (1975) (emphasis added).

In another decision of that circuit, the court stated:

> " . . . we are uncomfortable with the circularity of the approach suggested by the government, that, in order for the defendant to place comparable photographs in evidence for the purpose of establishing community acceptance, he must first establish community acceptance." *United States v. Petrov,* 747 F.2d 824, 832 (2d Cir. 1984), *cert. denied,* 471 U.S. 1025 (1985).

To fulfill this murky second foundational criteria, the Petitioners proffered the actual rental figures for the proffered comparison materials, and further submitted a map showing the location in the community of over 7000 renters of x-rated videos. Such evidence *appears* sufficient under existing case law to warrant admission. *See, for example, Flynt,* 264 S.E.2d at 676; *Saliba,* 475 N.E.2d at 1190 n.14; and Lentz, *Comparison Evidence in Obscenity Trials,* 15 Michigan Journal of Law Reform 45 (Fall 1981), at 69.

In addition, some federal courts have indicated that while availability, *in and of itself,* may not be sufficient to establish a "reasonable degree of community acceptance," such evidence is, still, probative. *See, for example, Womack,* 509 F.2d at 379; and *Various Articles of Obscene Merchandise, Schedule No. 2102,* 709 F.2d at 136-137. Because of the lack of direction from this Court regarding this First Amendment evidentiary issue, trial courts feel free, as was the case here, to exclude such evidence, even if the questionable foundational criteria for admission has been seemingly fulfilled. The exclusion of this evidence, along with the exclusion of the expert witness testimony and surveys, illustrates that direction is needed from this Court so that the constitutional rights of Defendants in criminal obscenity prosecutions to "put on a defense" continue to have some modicum of meaning.

II.

THE DECISION OF THE FOURTH CIRCUIT, ALLOWING THE OBSCENITY OF "DEVIANT" MATERIAL TO BE DETERMINED BY REFERENCE TO THE AVERAGE PERSON IN THE COMMUNITY, IS IN CONFLICT WITH DECISIONS OF THIS COURT, OTHER CIRCUIT COURTS OF APPEALS, AND THE PLAIN LANGUAGE OF NUMEROUS STATE OBSCENITY STATUTES, INCLUDING THE NORTH CAROLINA OBSCENITY STATUTE CONTROLLING THIS STATE PROSECUTION. THE ISSUE OF THE PROPER "REFERENCE" GROUP FOR DECIDING THE OBSCENITY OF "DEVIANT" MATERIAL IS AN IMPORTANT QUESTION OF CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

One of the films at issue depicted various homosexual acts between two adult males, and contained absolutely no depictions of heterosexual activity. See App. A(22). The record supports that this film, entitled "Video Games," was designed for and primarily disseminated to homosexuals, the trial judge even referring to it at one point as "this homo film . . . ".[19]

In *Mishkin v. New York*, 383 U.S. 502 (1966), this Court noted that such material must be judged by the material's effect upon the average member of the group to whom it is designed for and primarily disseminated to, rather than its effect upon public at large. *Id.*, at 508. *See also Miller*, 413 U.S. at 33; and *Hamling*, 418 U.S. at 129. This Court's pronouncement in *Mishkin* has been statutorily adopted by the state of North Carolina in its "obscenity statute," which states, in part:

---

[19] Defendants also presented at trial the testimony of Donald King, a leader in the Charlotte gay community, who testified that he was familiar with the viewing habits of gay men regarding sexually explicit material, that he had viewed the film "Video Games," and that it was a standard type of film designed for gay men, who would be the primary purchasers/renters/viewers of that film. *Compare, Pinkus*, 436 U.S. at 301-302.

> "Obscenity *shall* be judged with reference to ordinary adults *except that* it shall be judged with reference to children or *other especially susceptible audiences* if it appears from the *character of the material or circumstances of its dissemination* to be *especially designed for or directed to such children or audiences*." N.C.G.S. 14-190.1(d) (emphasis added).[20]

Similar or virtually identical language is used in numerous state obscenity laws as statutory codification of this Court's decision in *Mishkin*.[21]

---

[20] There is no doubt that this language, derived from the A.L.I. Model Penal Code § 251.4(1), is a statutory reiteration of the *Mishkin* doctrine. *See* A.L.I. Model Penal Code (1980), § 251.4(1), at 513. *See also People v. Spargo*, 431 N.E.2d 27, 32-33 (Ill. App. 2d Dist. 1982); *Newman v. Connover*, 313 F. Supp. 623, 629-630 (N.D. Tex. 1970); *Hamling*, 418 U.S. at 107; and *Ward v. Illinois*, 431 U.S. 767, 770 n.1 (1977).

[21] State statutes which are virtually identical include Idaho Code § 18-4101(B); Ill. Ann. Stat. Ch. 38 para. 11-20(c); N.D. Cent. Code § 12.1-27.1-01(5); Ohio Rev. Ann. § 2907.01(F); S.C. Code Ann. § 16-15-305(D); and S.D. Codified Laws Ann. § 22-24-27(12). These statutes all make clear that when the material is designed for or primarily disseminated to children, "deviant sexual groups," or "especially susceptible audiences," the obscenity of that material *must* be evaluated in reference to the materials' impact and/or effect on *that group*, rather than upon the adult community at large. However, some other state statutes parrot § 251.4(1) of the Model Penal Code, which while indicating that the obscenity of the material must be judged "with reference to ordinary adults *unless* it appears from the

(Continued on following page)

At trial, Defendants requested jury instructions consistent with *Mishkin* and the state statute (App. J), and specifically requested a simple charge of the statute itself. Instead, after charging the jury with the tests of prurient appeal and patent offensiveness, the trial court stated:

> "Both of these tests of obscenity that I have related to you *must be considered and judged with reference to the average adult in the community* rather than the most tolerant or most prudent (sic)." (Emphasis added)

Petitioners asserted in the district court below that this instruction violated not only the First Amendment (pursuant to this Court's decision in *Mishkin*), but violated due process as well by instructing the jury in a manner that was simply inconsistent with the statutory elements of the crime charged. The District Court, however, asserted that such an argument "reek[ed] with the putrid stench of frivolity." App. A(23). Yet, both precedent and legal commentary in this area support Petitioners' position.

It seems readily apparent (and, indeed, previously adjudicated by this Court) that when material contains depictions and descriptions which are of *both* a deviant

---

(Continued from previous page)

character of the material or the circumstances of its dissemination to be designed" for another reference group (i.e., children, "deviant sexual groups," or "especially susceptible audiences"), do not specifically indicate what the reference group is to be when judging the obscenity of such materials. *See, for example,* Conn. Gen. Stat. § 53a-193(a); N.H. Rev. Stat. Ann. § 650:1(V); and N.Y. Obscenity Law § 235.00(1). The question then becomes whether the obscenity of such material *must* be judged in reference to the materials' impact and/or effect on *only* the audience to which it is directed, or whether it may be evaluated upon *either* the adult community as a whole, *or* the audience to which it is directed. It is this issue that warrants review by this Court.

and a non-deviant nature, the materials' impact may be evaluated in relation to both or *either* non-deviant and deviant groups. *Hamling*, 418 U.S. at 128-129; and *Schauer*, *supra*, at 78 n.43. Unresolved by this Court, however, and directly at issue here, is the question of the proper "reference" group for determining obscenity when material is wholly and completely of a "deviant" nature.

Petitioners assert that in such circumstances, *Mishkin* commands that the material must be judged *only* by reference to the average member of the deviant group. Indeed, the modification of the "reference" group in *Mishkin* was the result of the appellant's argument there that the "deviant" material at issue did not appeal to the prurient interest of the "average person," in that "instead of stimulating the erotic, they disgust and sicken." 383 U.S. at 508. In rejecting the argument that the convictions against the defendant there must then be reversed, and in declaring that the prurient-appeal requirement would be satisfied if the material appealed to the prurient interest in sex of the members of the deviant sexual group, this Court thus implicitly acknowledged that *but for* the constitutional modification as found in *Mishkin*, the appellant there would have been correct; that is that the charges must have been dismissed since "deviant" material does not appeal to the prurient interest in "average" members of the community – rather, such materials to the average person merely "disgust and sicken." *Mishkin* was thus a constitutional device to ensure that such materials would not escape prosecution.

Therefore, to allow the obscenity of the film "Video Games" to be evaluated in reference to its impact upon the average members of the adult community allows the obscenity of that material to be decided upon the fact that it may "disgust and sicken" the average person, rather than upon whether or not the material "appeals to the prurient interest" (since by implication, such material does not appeal to the prurient interest of the average member of the community). Such a strained interpretation of *Mishkin* clearly results in an unconstitutional adjudication of obscenity pursuant to the First Amendment.

In addition, legal commentary and other appellate decisions support the position that the jury instruction as given is constitutionally defective. Professor Frederick Schauer, in his treatise *The Law of Obscenity*, 1976, notes:

> "The words of the Court in *Mishkin* seem fairly self-explanatory. If the materials are designed for a deviant group, then prurient appeal *must* be measured in terms of that group." *Id.*, at 78 (emphasis added).

The Second Circuit has expressed agreement with Professor Schauer's comments, by noting that material appealing to atypical sexual "proclivities":

> " . . . may be found 'obscene' *only* when its dominant theme appeals to the prurient interest of members of a 'clearly defined deviant sexual group.' " *United States v. Petrov*, 747 F.2d 824, 830 (2d Cir. 1984), *cert. denied*, 471 U.S. 1025 (1985), citing *Mishkin*, 383 U.S. at 508 (emphasis added). *Accord United States v. Palladino*, 490 F.2d 499, 501 (1st Cir. 1974).

Since the film "Video Games" is completely devoid of any standard heterosexual conduct, pursuant to the requirements of *Mishkin* and, more importantly, pursuant to the *mandatory* language in N.C.G.S. 14-190.1(d), that film should have been judged with reference to its impact upon adult homosexuals, and not by its impact on the "average person" in the community.[22] As the Fourth Circuit

---

[22] It is clear that homosexuals are a deviant group pursuant to *Mishkin*, and more importantly, are an "especially susceptible audience" as found in the statutory language at issue. *See, for example, Pinkus v. United States*, 436 U.S. at 301-303 in conjunction with the underlying appellate decision found at 551 F.2d 1155, 1158 n.7, 1161 (9th Cir. 1977); *United States v. Potomac News Company*, 373 F.2d 635, 640-641 (4th Cir.

(Continued on following page)

decision seemingly conflicts with this Court's pronouncements in this area of the law, and unquestionably conflicts with the Second Circuit's decision in *Petrov*, the First Circuit's decision in *Palladino*, and with established legal commentary, this Court should accept this case for review to resolve this conflict and to ensure that the prosecutions of "deviant" material utilize a proper constitutional standard of obscenity.

In addition, there is a further due process issue implicated by the state trial court simply deciding not to instruct pursuant to the plain language of this charging statute, that warrants review by this Court. It is axiomatic that due process is violated when a jury is not instructed with each essential element of the crime charged. *See, for example, Holland v. United States*, 348 U.S. 121, 138 (1954); *United States v. Hutchinson*, 338 F.2d 991 (4th Cir. 1964); *United States v. Hiscott*, 586 F.2d 1271, 1275 (8th Cir. 1978); *United States v. Levi*, 153 F.2d 995, 998 (3rd Cir. 1946); and *Glenn v. Dallman*, 686 F.2d 418, 421 (6th Cir. 1982). This was simply not done here, as the trial court plainly ignored in its charge to the jury the mandatory statutory requirement as found in N.C.G.S. 14-190.1(d).

The trial court's refusal to charge the jury with the Petitioners' proposed jury instructions, including the provisions N.C.G.S. 14-190.1(d), clearly violates the constitutional mandate as set forth by this Court in *Mishkin*, *Miller* and *Hamling*, as well as the Petitioners' due process rights under the Fourteenth Amendment, and thereby not only allowed, but, in fact, mandated that the trier of fact judge this particular film by its impact upon, and with

---

(Continued from previous page)

1967), *rev'd on other grounds*, 389 U.S. 47 (1967); *Lakin v. United States*, 363 A.2d 990, 997 n.9 (D.C. 1976); *United States v. Manarite*, 448 F.2d 583, 592 (2d Cir. 1971), *cert. denied*, 404 U.S. 947 (1971); and *People v. G.I. Distributors, Inc.*, 228 N.E.2d 787 (N.Y. 1967).

regard to, the wrong reference group.[23] These violations of Petitioners' First Amendment and due process rights warrant review by this Court.

CONCLUSION

For all of the reasons noted above, this Court should accept this case for review to provide direction in these areas of First Amendment jurisprudence that have resulted in diverse and inapposite appellate decisions being reached across the country.

Respectfully submitted,

KLEIN & SHAFER, P.C.

BRADLEY J. SHAFER*
LEE J. KLEIN
Attorneys for Petitioners
P.O. Box 1426
Okemos, MI 48805-1426
517-349-8666

*Counsel of Record

NELSON CASSTEVENS
602 East Morehead Street
Charlotte, NC 28202
704-372-2140

Co-Counsel for Petitioners

---

[23] This error cannot be considered to be harmless. At trial, defense witness Donald King testified that "Video Games" would not appeal to the prurient interest of homosexuals, and that homosexuals would not find that film to be patently offensive. The trial court's erroneous instruction, however, required the jury to ignore this testimony. *Compare, Mishkin*, 383 U.S. at 509. Because the omission of the jury instructions requested by Petitioners resulted in the obscenity of the film "Video Games" being evaluated pursuant to an unconstitutional standard, and because the erroneous instruction required the jury to ignore the testimony of defense witness King, this error is of sufficient magnitude to warrant habeas corpus review pursuant to the standard as set forth by this Court in *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

APPENDIX A

Jim ST. JOHN, Curtis Rene Peterson and Cinema Blue of Charlotte, Inc., Petitioners

v.

STATE OF NORTH CAROLINA PAROLE COMMISSION, Louis Columbo, Chairman and John Patseavouras, Director of the State of North Carolina Parole Commission, Respondents.

No. C-C-90-286-P.

United States District Court,
W.D. North Carolina,
Charlotte Division.

May 2, 1991.

Nelson Casstevens, Casstevens Hanner Gunter & Gordon, Harold Bender, Charlotte, N.C., Lee J. Klein, Bradley J. Shafer, Klein & Shafer, P.C., Okemos, Mich., for petitioners.

Richard N. League, Sp. Deputy Atty. Gen., Raleigh, N.C., for respondents.

MEMORANDUM OF DECISION AND ORDER

ROBERT D. POTTER District Judge.

THIS MATTER is before the Court on Respondents' motions, filed October 22, 1990, for summary judgment. The motions are in response to a petition filed by Petitioners on August 31, 1990 in which Petitioners St. John and Peterson seek relief from incarceration under 28

U.S.C. § 2254, and Petitioner Cinema Blue seeks relief from paying a fine under 42 U.S.C. § 1983. On March 4, 1991, Respondents filed amended motions for summary judgment. Petitioners, on March 7, 1991 and March 19, 1991, filed responses to the motions for summary judgment. On April 18, 1991, Petitioners filed an amended petition naming as Respondents those state officials currently maintaining custody over Petitioners.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners were indicted in 1988 by the Mecklenburg County, North Carolina Grand Jury on various counts of disseminating obscene materials in violation of N.C.Gen.Stat. § 14-190.1. Cinema Blue was an adult bookstore and theater located in Mecklenburg County. Although the record is not entirely clear, it appears that Petitioners St. John and Peterson were the owners/operators of Cinema Blue. The indictments charged Petitioners with selling six (6) obscene videotapes and one (1) obscene magazine in 1988. Prior to trial, the State dismissed the indictment as to three (3) of the videotapes.

In February, 1989, the Honorable Marvin Gray presided over the trial involving the remaining three (3) videotapes and the single magazine.[1] The videotapes were shown to the jury as was the magazine. The principal evidence offered by Petitioners was the voir dire, proffered testimony of five (5) expert witnesses and documents derived from studies conducted by these experts. The studies included a random telephone survey of 407 adults from Mecklenburg County, a film evaluation study by 129 adults of the six (6) videotapes and the magazine listed in the indictment, a telephone study of 200 Cinema Blue customers, and a study of materials comparable to those at issue in the indictment. The expert witnesses testified that their studies indicated pursuant to the contemporary community standard of Mecklenburg County, the materials at issue would not appeal to a prurient interest and would not be patently offensive to the average person in the community.

---

[1] The lurid titles of the videotapes were "Video Games, Vol. X, Cum and Cum Again", "the Big Switch", and "Cum Shot Review, Vol. Four". The magazine contained an equally repulsive title – "Pregnant and Sexy". It does not take a great deal of imagination to ascertain the content of these materials.

After hearing the voir dire testimony, Judge Gray excluded all of the expert testimony, the documents from the studies, and the expert conclusions derived from the studies. Thereafter, the jury found the videotapes "Video Games Vol. X, Cum and Cum Again III" and "Cum Shot Review, Vol. Four" obscene. The jury failed to find the remaining videotape "the Big Switch" and the magazine to be obscene. Accordingly, the jury returned guilty verdicts against Petitioners. Judge Gray imposed terms of imprisonment of six (6) years each on Petitioners St. John and Peterson, and imposed a $150,000.00 fine on Petitioner Cinema Blue.

Petitioners appealed to the North Carolina Court of Appeals. On June 5, 1990, that court affirmed the convictions and finding that the two (2) videotapes were obscene. The North Carolina Supreme Court entered a temporary stay of execution of sentence on June 27, 1990.

On July 26, 1990, the North Carolina Supreme Court dissolved the stay and denied Petitioners' Petition for Discretionary Review. The court, on August 20, 1990, denied Petitioners' motion for reconsideration.

This action was filed on August 31, 1990 and assigned to the undersigned.[2] On September 26, 1990, Petitioners filed a motion to stay the execution of sentence. The Court on October 1, 1990 denied Petitioners' motion. The Court is informed that thereafter Petitioners were taken into custody by the appropriate North Carolina officials. On January 23, 1991, the Court entered an Order staying this matter while Petitioners' writ of certiorari was pending before the United States Supreme Court.

---

[2] Although the issue has not been directly raised, it is apparent from the Petition that Petitioners assumed this matter would be assigned to the Honorable James B. McMillan. Judge McMillan presided over a motion for an injunction enjoining the Mecklenburg County District Attorney from prosecuting Petitioners' experts for disseminating obscenity during the completion of the studies. *See Cinema Blue of Charlotte v. Gilchrist,* 704 F.Supp. 631 (W.D.N.C. 1989). Judge McMillan entered the injunction. The Fourth Circuit several weeks later, however, reversed Judge McMillan on *Younger* abstention grounds. *See Cinema Blue of Charlotte v. Gilchrist,* 887 F.2d 49 (4th Cir.1989).

The issues involved in the previous action were completely different than the issues currently before this Court in the pending habeas case. Accordingly, the Clerk was correct in utilizing the random selection process which resulted in this matter being assigned to a different judge. Furthermore, the previous case was closed out and was not pending when this action was filed.

Throughout the Petition and various other pleadings, Petitioners refer to Judge McMillan's previous order and imply that this Court is bound to those findings. This Court is not bound by rulings that the undersigned was not a party to, and and [sic] more important, the Fourth Circuit explicitly reversed Judge McMillan. The implication that the undersigned is bound by a ruling that was found by the Court of Appeals to be legally erroneous is ludicrous.

The Court dissolved that stay on March 6, 1991 after learning that the Supreme Court had denied certiorari on February 19, 1991. On March 26, 1991, the Court granted Petitioners' motion to amend the petition in order to substitute the parties presently having custody of Petitioners as Respondents. On April 18, 1991, Petitioners filed the amended petition substituting as Respondents the appropriate North Carolina Parole Commission officials since Petitioners have been recently paroled. Because the amended petition is identical to the original petition and because the interests of the current Respondents are identical to that of the former Respondents, the Court does not believe it is necessary for Respondents to respond to the amended petition. Rather, the Court will treat the previously filed materials of the former Respondents as having been filed for the current Respondents.

Having given the parties ample time to brief the numerous issues presented in the Petition, the Court now believes that this matter is ripe for disposition. The Court for the reasons enunciated below finds that Petitioners' federal constitutional rights were not violated during the trial of this matter, and that Respondents motion for summary judgment should be granted.

II. APPLICABLE LEGAL STANDARD FOR SUMMARY JUDGMENT.

Summary judgment is appropriate when the pleadings, responses to discovery, and the record reveal that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *See* Rule 56(c) of the Federal Rules of Civil Procedure. The party moving for summary judgment has the initial burden of showing that no genuine issue of any material fact exists and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). After the moving party has met its burden, the non-moving party must come forward with specific facts showing that evidence exists to support its claims and that a genuine issue for trial exists. *Id.; Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *see* F.R.Civ.P. 56(e) (in response to motion for summary judgment, "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). When considering motions for summary judgment, courts must view facts and inferences from the facts in light most favorable to the party opposing the motion for summary judgment. *Matsushita,* 475 U.S. at 587-88, 106 S.Ct. at 1356-57; *United States v. Diebold, Inc.,* 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176 (1962). When, however, the evidence from the entire record could not lead a rational factfinder to find for the non-moving party, no genuine issue for trial exists and summary judgment is appropriate. *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356.

In this case, only legal issues are presented to the Court concerning the constitutionality of Petitioners' convictions. Thus, no issues of material fact are in dispute and summary judgment is appropriate. The Court has reviewed the entire record in this matter including the case file, the voluminous transcripts from the trial, relevant exhibits from the trial, and the applicable law.[3] The Court's discussion follows.

III. DISCUSSION.

A petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 is the procedure utilized to challenge on federal constitutional grounds a state conviction. *See Postconviction Relief and Prisoners' Civil Rights Law in the Fourth Circuit,* at 1 (1991) (hereinafter "Postconviction Relief"). The Petitioner must show a substantial constitutional deprivation in order to prevail on the habeas petition, and the Petitioner carries the burden of proof. *See Clayton v. Haynes,* 517 F.2d 577 (4th Cir.1975).

---

[3] No issue concerning the obscenity of the videotapes has been raised by Petitioners. Rather, Petitioners contend primarily that the trial court impermissibly denied them of the opportunity to present a defense. Other issues raised by Petitioners include the failure of the prosecution to prove scienter, improper jury instructions, the improper introduction of one of the Petitioners' statements, and the introduction of prior convictions. None of these issues address whether the videotapes were obscene materials under the First Amendment. Accordingly, the Court does not believe that it was necessary for it to review the videotapes.

In order to maintain standing in a § 2254 action, the Petitioner must raise a cognizable claim – one that alleges violations of the federal Constitution, laws or treaties. *See Rose v. Hodges,* 423 U.S. 19, 96 S.Ct. 175, 46 L.Ed.2d 162 (1975). Moreover,the Petitioner must be in state custody. *See Jones v. Cunningham,* 371 U.S. 236, 240, 83 S.Ct. 373, 375-76, 9 L.Ed.2d 285 (1963). The Petitioner must also raise a "live case or controversy" – one that is not moot. *See Leonard v. Hammond,* 804 F.2d 838 (4th Cir.1986). Additionally, the Petitioner must have exhausted all state remedies. *See Preiser v. Rodriguez,* 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973). The Petitioner is further required to have complied with state procedural rules which would provide adequate and independent grounds for state relief. *See Harris v. Reed,* 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Finally, the Petitioner must demonstrate that the petition is not prejudicially delayed or successive. *See Sanders v. United States,* 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963); *Johnson v. Riddle,* 562 F.2d 312 (4th Cir. 1977).

In this case, Respondents have not raised any serious contentions that Petitioners have failed to meet their initial burden of standing as enunciated above.[4] The basis of

---

[4] In its amended motion for summary judgment filed March 4, 1991, Respondents have raised several procedural defenses regarding the claim under 42 U.S.C. § 1983. Although not entirely clear from the petition, it appears that the § 1983 claim is limited to Petitioner Cinema Blue. However, Respondents state that the defenses apply to all Petitioners. Furthermore, those defenses may overlap with the habeas claims.

(Continued on following page)

Respondents' motion for summary judgment is that Petitioners have failed to carry their burden of demonstrating that a substantial constitutional deprivation was committed by the trial court.

Petitioners believe the following arguments support their contention that relief is available:

(A) The trial court excluded Petitioners' expert evidence in violation of Petitioners' right of confrontation and compulsory process pursuant to the Sixth Amendment and their due process rights pursuant to the Fourteenth Amendment;

(B) The convictions violate the First Amendment because no evidence was presented by Respondents to establish scienter;

(C) Petitioners were convicted in violation of their First Amendment Rights in having one of the films at issue judged by the wrong reference group;

(D) Testimony by Government witnesses of guilty pleas and convictions was improperly introduced;

(Continued from previous page)

The Court has received the defenses raised by Respondents. The Court believes those defenses are inapplicable to the habeas action. As to the applicability of defenses to the § 1983 action the Court believes (as discussed *infra.*) that Petitioners have failed to demonstrate a constitutional deprivation occurred at the trial of this matter. Therefore, the § 1983 action cannot proceed. Accordingly, the Court does not believe it necessary to address the defenses raised by Respondents.

(E) Hearsay statements of Petitioner Peterson were improperly introduced; and

(F) Several jury instructions were violative of constitutional protections.

The Court will discuss each argument below.

A. *THE EXCLUSION OF EXPERT TESTIMONY.*

As previously noted, Petitioners at trial proffered the testimony of five (5) expert witnesses concerning studies conducted by the experts. Not surprisingly, those studies led Petitioners' experts to conclude that pursuant to the contemporary community standard of Mecklenburg County, the materials at issue would not appeal to a prurient interest and would not be patently offensive to the average person in the community; that is, the material were not obscene.[5]

After hearing the testimony of the experts and examining the results of the studies, Judge Gray found that the issues addressed by the studies ultimately concerned issues that had to be resolved by the jury. Judge Gray indicated he did not believe that the results of the studies and the testimony of the experts would be of assistance to the jury and might even result in jury confusion if introduced. Therefore, Judge Gray excluded the evidence pursuant to Rule 702 of the North Carolina Evidence Code (codified at N.C. Gen.Stat., § 8C-1). *See Trial Transcript* at 874 (hereinafter "TT"). As an alternative position, Judge Gray found that any probative value of the proffered expert testimony was substantially outweighed by the danger of confusion to the jury and should be excluded under Rule 403 of the North Carolina Evidence Code.

---

[5] The United States Supreme Court has developed a tripartite test in examining whether pornographic materials can be deemed unlawfully obscene under a state law. *See Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 2615, 37 L.Ed.2d 419 (1973). "[T]he basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value". *Id.* (citations omitted). In this case, only the first and second prongs of the test are at issue.

The United States Supreme Court has consistently held that expert testimony in an obscenity prosecution is not necessary if the materials at issue are introduced. *See Pinkus v. United States*, 436 U.S. 293, 302, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978) ("[W]hether materials are obscene generally can be decided by viewing them; expert testimony is not necessary"); *Hamling v. United States*, 418 U.S. 87, 100, 94 S.Ct. 2887, 2899, 41 L.Ed.2d 590 (1974) ("[E]xpert testimony is not necessary to enable the jury to judge the obscenity of material which, as here, has been placed into evidence"); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56, 93 S.Ct. 2628, 2634-35, 37 L.Ed.2d 446 (1973) ("[I]n the cases in which this Court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question. *Ginzburg v. United States*, 383 U.S. 463, 465, 86 S.Ct. 942, 944, 16 L.Ed.2d 31 (1966)"). The Supreme Court has made it abundantly clear that the United States Constitution does not dictate that expert testimony be introduced in an obscenity case. *See Kaplan v. California*, 413 U.S. 115, 122, 93 S.Ct. 2680, 2685, 37 L.Ed.2d 492 (1973) (holding that prosecutor's evidence without introduction of expert testimony was "[s]ufficient as a matter of federal constitutional law to support petitioner's conviction"). The defense should be free to introduce expert testimony only if the materials are appropriate; in other words relevant and helpful to the jury. *Id.*[6]

---

[6] Petitioners have attempted to avoid the clear import of these line of cases by arguing that those cases involved an argument by a petitioner that the Government had failed to prove its case by not introducing expert evidence attesting to the obscenity of the charged materials. Petitioners have brought to the Court's attention an Ohio Court of Appeals case that held that the aforementioned line of cases are limited to only those situations where the prosecution fails to introduce expert testimony and not the situation where a defendant attempts to introduce such testimony. *See State v. Barton,* 45 Ohio App.2d 249, 344 N.E.2d 342 (1975).

The Court has reviewed that decision. In as much that the decision is not bringing precedent, the Court chooses to disregard it. Moreover, the court finds the rationale of the decision flawed. In *Kaplan v. California,* 413 U.S. 115, 121, 93 S.Ct. 2680, 2685, 37 L.Ed.2nd 492 (1973), the Supreme Court stated, "[W]e also rejected in *Paris Adult Theatre I* any constitutional need for 'expert' testimony on behalf of the prosecution, *or for any other ancillary evidence of obscenity,* once the allegedly obscene material itself is placed in evidence", (emphasis added and citations omitted). *See also United States v. Pryba,* 900 F.2d 748, 757 (4th Cir.) (holding that *Paris Adult Theatre I* case was applicable to situation where district court excluded defense expert testimony), *cert. denied,* ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990). It is evident to this Court that the Supreme Court has not limited the aforementioned line of cases to the situation where the prosecution fails to introduce expert testimony.

The rationale for the well-established rule that expert testimony need not be introduced in an obscenity case is grounded in common sense. The films are the best evidence of what they represent. *See Paris Adult Theatre I,* 413 U.S. at 56, 93 S.Ct. at 2634-35. Moreover, obscenity is not a subject that lends itself to the traditional use of expert testimony. *Id.* at 56, note 6, 93 S.Ct. at 2634, note 6. Expert testimony is usually admitted to assist lay jurors in understanding what they otherwise could not. *Id.* The uses of such testimony employed in obscenity cases "[h]ave often made a mockery out of the otherwise sound concept of expert testimony". *Id.* As one court has so succinctly noted, "[S]imply stated, hard core pornography . . . can and does speak for itself". *Id.* (citing *United States v. Wild,* 422 F.2d 34, 36 (2d Cir. 1970), *cert. denied,* 402 U.S. 986, 91 S.Ct. 1644, 29 L.Ed.2d 152 (1971)).

Courts have extended the rule that expert testimony in obscenity cases is not constitutionally mandated to habeas actions. One court refused to find that a state court trial was conducted in an unconstitutional manner when the trial judge gave the following jury instruction:

> In the trial of a pornography case, neither the prosecution *nor the defense* shall be required to produce expert testimony as to whether the material or performance is or is not harmful to adults, or is not pornographic, or as to any element of the definition of pornographic, including contemporary community standards (emphasis added).

See Piepenburg v. Cutler, 649 F.2d 783, 793 (10th Cir.1981). The Court in *Piepenburg,* in applying the Supreme Court test in an action brought pursuant to § 2254, noted, "[w]hen the material itself is introduced into evidence, the jury may judge for itself, using its own sense of community standards, whether the material is obscene; that is, the jury brings to the trial the community standard and no evidence is necessary to establish it". *See id.* at 792; *see also Avery v. Maryland,* 515 F.Supp. 818, 823 (D.Md. 1980) ("[T]he presentation of expert testimony by the prosecution is neither mandated nor likely to be helpful to the jury in the routine obscenity case . . . (and the) failure to provide such testimony is not a basis for habeas corpus relief"), *aff'd* 661 F.2d 917 (4th Cir.), *cert. denied,* 454 U.S. 1081, 102 S.Ct. 625, 70 L.Ed.2d 615 (1981).

The Fourth Circuit has recently addressed the question of whether the exclusion of defense expert testimony in an obscenity case was an error of constitutional dimension. In *United States v. Pryba,* 900 F.2d 748, 757 (4th Cir.), *cert. denied,* ___ U.S. ___, 111 S. Ct. 305, 112 L.Ed.2d 258 (1990), the court reiterated the Supreme Court rule that the jury needs "[n]o assistance from experts on the issue of obscenity once the challenged materials are in evidence". The court upheld the decision of the district court judge in finding that a study conducted by an expert was inaccurate and would not assist the jury. *Id.; see also United States v. Bamman,* 737 F.2d 413 (4th Cir.1984), *cert. denied,* 469 U.S. 1110, 105, S.Ct. 789, 83 L.Ed.2d 783 (1985) (admission of expert testimony is in sound discretion of trial court and may be excluded when speculative).

The court will address below each of the surveys conducted by Petitioners' experts and whether the exclusion of those surveys constituted a substantial constitutional deprivation.

1. *Telephone-Surveys*

In reviewing the record from this case, the Court cannot conclude that Judge Gray abused his discretion in excluding the expert testimony regarding the two (2) telephone surveys. In reviewing a similar opinion poll, the district court in *Pryba* found that the opinion poll was not relevant to whether the charged materials were obscene, and even if relevant, its probative value was exceeded by the unfair prejudicial effect the poll would have. *See United States v. Pryba,* 678 F.Supp. 1225, 1228 (E.D. Va.1988), *aff'd* 900 F.2d 748 (4th Cir.), *cert. denied,* ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990).

The district court was concerned in particular that the survey questions did not convey the impact of the visual image of the materials.[7] Similarly in this case, the survey questions from the random telephone survey questions were inadequate to convey the impact of the visual image of the materials.[8] The Court believes that the

---

[7] The survey described the nudity and sex shown in the materials in the following manner: "nude bodies and close-up, graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these by adult performers". *Pryba,* 678 F.Supp. at 1228. The district court noted that the term "bondage" did not adequately describe the activities actually depicted in the films such as women's breasts and men's genitals being placed in tourniquet devises. *Id.* at 1229.

[8] Only three of the questions directly dealt with adult oriented materials. Those questions included:

> 18. Do you think it is or is not tolerated in your community for the average adult to obtain and see

(Continued on following page)

trial court was correct in finding that the probative value of the survey was substantially outweighed by the danger of confusion to the jury. Accordingly, Petitioners have not suffered a substantial constitutional deprivation regarding the exclusion of this survey and any relevant testimony concerning it.[9]

(Continued from previous page)

> adult movies, video cassettes and magazines showing such nudity and sex if they should want to?
>
> 19. Do you believe you should or should not be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?
>
> 20. Some adult movies, video cassettes and magazines show actual sex acts in great detail and with close-ups of the sexual organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?

See Defendant's Exhibit #9 from Trial; Final Report of the Mecklenburg County North Carolina Film Evaluation Project, at 79-80.

Just as in *Pryba,* these sterile and innocuous questions do not begin to describe the graphic and lurid depictions of sexual activities contained in the videotapes at issue in this case. Moreover, the Court notes that the questions can hardly be described as objective. The "correct" answers are clearly suggested by the form of the questions. The Court can only wonder what results might have occurred if the questions would have accurately conveyed the graphic depictions contained in the videotapes.

[9] The Court recognizes that "[p]roperly conducted public opinion surveys may be useful (and thus admissible) in gauging community standards for the purposes of determining whether the materials at issue are obscene". *Pryba,* 678 F.Supp.

(Continued on following page)

As to the second telephone survey involving customers of Petitioner Cinema Blue, the Court finds the assertion that such a survey was designed to accurately reflect the community values analogous to asking the fox to guard the hen house. Common sense would lead any honest person to conclude that a customer of an adult book store is not going to reflect the values of the average person of the community. The court in *Pryba,* in response to a similar survey involving the same supposed expert as in this case, stated:

> Dr. Scott's (survey), in essence, constitutes nothing more than a one-man, eight-day, unscientific poll of purveyors and purchasers of smut. To permit this so-called 'study' to masquerade as expert testimony on Northern Virginia's contemporary community standards of obscenity is ludicrous.

Pryba, 678 F.Supp. at 1234. The Court concurs with that assessment as applied to the study at issue here, and finds that the trial court did not abuse its discretion in excluding the survey. Thus, it cannot be said that the exclusion constituted a constitutional deprivation of Petitioners' rights.

(Continued from previous page)

at 1229. However, the Court rejects Petitioners' contention that the introduction of such surveys at trial is constitutionally mandated. Petitioners have failed to demonstrate that Judge Gray abused the great amount of discretion given to him in excluding the expert testimony. The Court further notes that the burden of demonstrating a constitutional deprivation is on Petitioners, and that Petitioners have failed to meet the burden placed upon them in sustaining an action brought pursuant to 28 U.S.C. § 2254.

2. *Comparison Evidence.*

Petitioners offered the proffered testimony of one of their experts regarding a study of 100 sexually explicit videotapes that had been rented by customers of Cinema Blue. The videotapes were rented during a seven (7) month period on over 5,000 occasions, but not necessarily to 5,000 different individuals. The expert testified that the videotapes, which allegedly contained content similar to the videotapes charged in the indictment, were supposedly rented by a wide cross section of adults in Mecklenburg County. *See* TT at 802-03.[10] On cross-examination of the expert, however, the expert admitted that he was unable to determine whether some of the videotapes had been repetitiously rented by the same customers. *Id.* at 810. Moreover, the expert was unable to document whether the videotapes had been rented only by persons residing in Mecklenburg County. *Id.* at 811.

---

[10] The expert examined lists supplied by Petitioners containing the title of the videotapes and the number of times each videotape had been rented over the seven (7) month period. The list, however, did not contain the name of the individuals renting the videotapes. Thus, the expert was unable to determine whether the same customers were renting different videotapes each week or month. Despite this obvious deficiency in the methodology of the study, the expert nonetheless concluded that the videotapes were rented by a large cross-section of the community. The expert concluded that since the videotapes had been rented on over 5,000 occasions, that 2% of the population of Mecklenburg County had rented the videotapes. As previously discussed, however, this conclusion is seriously flawed in light of the expert's failure to factor into his analysis repeat renters. In any event, it is evident that 2% of the population of Mecklenburg County did not view these videotapes.

Even if there were no repeat renters of the videotapes and each of the renters resided in Mecklenburg County (which is highly unlikely as discussed *supra.*), the total films reviewed by Petitioners' expert only accounts for 2% of the population of Mecklenburg County – hardly a showing that the "comparable materials" possess a reasonable degree of community acceptance. *See Womack v. United States,* 294 F.2d 204, 216 (D.C.Cir.), *cert. denied,* 365 U.S. 859, 81 S.Ct. 826, 5 L.Ed.2d 822 (1961). Moreover, as previously stated, the Court does not believe that the customers of Cinema Blue are an accurate gauge of the values held by the average community member. Based on the testimony presented to the trial court, the Court does not believe that it was erroneous for Judge Gray to conclude that this evidence was unreliable or unhelpful to the jury. The Court does not believe that Petitioners have demonstrated that they suffered a constitutional deprivation by this study being excluded.

3. *Film Evaluation Study.*

In addition to the other studies, Petitioners attempted to introduce at trial a study involving focus groups that reviewed the films named in the indictment. According to Petitioners, the admission of such a study has never been attempted at an obscenity trial. *See Petitioners' Brief of August 31, 1990,* at 18. Because the materials presented in the study were the films actually at issue, Petitioners argue that the trial court had no basis in law to exclude these studies.

Admittedly, the procedures utilized in the film evaluation study were designed to lead to the introduction of more relevant evidence than the other studies. Nonetheless, the Court does not believe that this fact alone requires the admission of the study. The proffered expert testimony revealed that only 20 to 24 people viewed each of the videotapes at issue.[11] Given the fact that the study was conducted in conditions exclusively in the control of Petitioners, the Court does not believe that Judge Gray was in error in finding that this evidence would be of no assistance to the 12 members of the community comprising the jury. Simply put, the Court believes that the record in this matter raises serious questions regarding whether those selected to participate in the study were "average" members of the community. The Court can envision large numbers of the community refusing to participate in a study that would expose them to the filth contained in the films at issue here. Even if it could be demonstrated that the focus groups were comprised of "average" citizens, the Court doubts whether the opinion of 20 to 24 persons would be of great assistance to the jury in deciding what in effect is a jury question – whether the films were obscene. Thus, the Court believes that the trial court did not deprive Petitioners of any constitutional right in excluding this study.

---

[11] Petitioners argue that the Court should not consider the small composition of the focus groups because the district attorney threatened to prosecute the experts for disseminating obscenity if the films were shown to the focus groups. As previously noted, Judge McMillan entered an order enjoining the district attorney from prosecuting the experts. However, the Fourth Circuit vacated that order as being unlawful. The Court does not believe that Petitioners can complain of the size of the focus groups in light of the Fourth Circuits' opinion.

B. *WHETHER SCIENTER WAS ESTABLISHED.*

Petitioners argue that Respondents failed at trial to introduce any evidence demonstrating that Petitioners were aware of the contents of the materials at issue. Apparently, Petitioners St. John and Peterson were out-of-town owners/operators of Cinema Blue instead of clerks. Petitioners contend that the scienter requirement necessary to sustain a conviction for disseminating obscenity requires that evidence be introduced at trial showing that the defendants were aware of the contents of the charged materials. *See Hamling,* 418 U.S. at 121, 94 S.Ct. at 2909-10. Thus, Petitioners argue that their First Amendment rights have been violated.

While it is true Respondents failed at trial to introduce any *direct* evidence that Petitioners were aware of the contents of the charged materials, the Supreme Court in *Hamling* did not rule that only *direct* evidence can establish the scienter element necessary to sustain an obscenity conviction. Rather, the Supreme Court stated:

> It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the character and nature of the materials. To require proof of a defendant's knowledge of the legal status of the materials would permit the defendant to avoid prosecution by simply claiming he had not brushed up on the law.

Id. at 123, 94 S.Ct. at 2910-11. The Supreme Court has also found that knowingly distributing obscene materials can be defined as "knowledge" of, or "reason to know". *Id.*

(citing *Ginsberg v. New York,* 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968)).

In this case, Respondents introduced a plethora of circumstantial evidence indicating that Petitioners had a sufficient knowledge of the content of materials at issue. *See Respondents' Brief of October 22, 1990,* at 10; *see also* TT at 331-12, 448-50, 561, 575, 142-45, 149, 159-60, 178, 182, 187, 209-13, 223, 522, 245-46, 144, 178-79, 430-31 and 151. It was up to the jury to determine whether Petitioners had the requisite scienter to commit the crime charged. Obviously, from the circumstantial evidence presented at trial, the jury found that Respondents established the scienter element beyond a reasonable doubt. Therefore, the Court does not believe Petitioners have suffered a constitutional deprivation regarding this issue.

C. *WHETHER THE WRONG REFERENCE GROUP WAS UTILIZED IN REFERENCE TO THE VIDEOTAPE DEPICTING HOMOSEXUAL ACTS.*

One of the videotapes the jury found to be obscene, "Video Games Vol. X, Cum and Cum Again, III", depicted exclusively homosexual activity. Petitioners argue that the trial court erred in failing to instruct the jury to judge the videotape by the average member of the homosexual community, rather than the average member of the community.

Petitioners rely on the United States Supreme Court case of *Mishkin v. New York,* 383 U.S. 502, 86 S.Ct. 958, 16 L.Ed.2d 56 (1966). In that case, the Court held that when material is not designed to appeal to the prurient interest of the average member of society, but is instead designed to appeal to the prurient interest of a deviant member of society, the trial court may instruct the jury to consider whether the prurient interest of the material appeals to a member of the deviant group. *Id.* at 509, 86 S.Ct. at 963-64. Such an option is meant to foreclose the possibility of a defense that the material at issue when considered by the average member of the community, "[i]nstead of stimulating the erotic, disgust(s) and sicken(s)". *Id.* at 508, 86 S.Ct. at 963.

Petitioners' argument that *Mishkin* requires an instruction that particularly repulsive and offensive sexually explicit material be judged only by deviant members of the community reeks with the putrid stench of frivolity. It is evident from the decision in *Mishkin* that the Supreme Court was attempting to "adjust the prurient-appeal requirement to social realities". That is, some pornography is not designed to appeal to the prurient interest of the average member of the community. *Id.* at 509, 86 S.Ct. at 963-64. In order for the standard *Miller* test of obscenity to apply to this type of pornography, adjustments had to be made to the test. However, the Supreme Court has at no time indicated that this test was meant to require the Government to carry a heavier burden in proving materials obscene that are designed for use exclusively by deviant groups. *Id.; see also United States v. Guglielmi,* 819 F.2d 451, 455 (4th Cir.1987) ("[t]he district court was not required to ask the jury to find whether there was such a thing as an average zoophiliac and the appeal of the films to such a person"), *cert. denied,* 484

U.S. 1019, 108 S.Ct. 731, 98 L.Ed.2d 679 (1988).[12] If anything, *Mishkin* makes such prosecutions easier.

For these reasons, the Court concludes that the trial court did not err in failing to give the instruction urged by Petitioners.

D. *TESTIMONY BY WITNESSES OF GUILTY PLEAS AND CONVICTIONS.*

Two (2) ex-employees of Petitioners testified on behalf of Respondents at trial that they had been convicted of, or pleaded guilty to, obscenity counts in 1985. Another former employee testified that he had pleaded guilty to conspiracy to disseminate obscenity in the years of 1985 through 1988. Petitioners, without citing any law in support, contend that the introduction of this information somehow violated their due process rights.

---

[12] Petitioners argue that the trial court can instruct the jury to judge the materials with regard to the average member of the community if and only if the materials are designed to appeal to both the average member of the community and a member of the deviant group. But where the materials are designed only to appeal to the prurient interest of a member of a deviant group, Petitioners contend that the materials must be judged only in regards to an average member of the deviant group.

The Fourth Circuit in *Guglielmi* rejected such an argument. In that case, two (2) of the eight (8) films depicted exclusively bestiality material. *See Guglielmi,* 819 F.2d at 453. The court went on to find that the trial court did not abuse its discretion in instructing the jury to consider the films with regard to an average member of the community.

Such an analysis is based on common sense. "[W]e reject the notion that greatly offensive material has the protection of the First Amendment while less offensive material does not". *Id.* at 452.

The argument is completely nonsensical. It appears from the record that the information was introduced in order to place the testimony in context. Moreover, the tactical move of a party impeaching its own witness in order to limit the damage of that testimony on cross-examination is well established. *See Clanton v. Bair,* 826 F.2d 1354, 1359 (4th Cir. 1987), *cert. denied,* 484 U.S. 1036, 108 S.Ct. 762, 98 L.Ed.2d 779 (1988).

The Court can think of numerous other reasons why this information was relevant and admissible. Because Petitioners have failed to make an argument that is even slightly plausible, the Court will not spend any more time addressing this issue. The Court rejects the argument that Petitioners suffered a constitutional deprivation when the trial court allowed the witnesses to testify regarding convictions and guilty pleas.

E. *HEARSAY STATEMENTS.*

One of the Petitioners' ex-employees testified at trial that Petitioner Peterson told him that Peterson was no longer his boss, and that he would have to take up any job related problems with Petitioner St. John. Petitioner St. John contends that this hearsay testimony violated his constitutional rights to confront Respondents' witness since Petitioner Peterson did not take the stand. *See Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1629, 20 L.Ed.2d 476 (1968).

The Court finds this argument to be as frivolous as the last argument. A *Bruton* violation does not occur if the jury had an adequate basis on which to evaluate the truth or falsity of the statement despite the lack of an opportunity to cross-examine. *See California v. Green,* 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). In this case, the fact that Petitioner St. John at some point in time assumed that managerial responsibilities from Petitioner Peterson was established by other, non-objected to testimony. *See* TT at 352. Accordingly, the admission of the testimony was harmless error even if the testimony violated *Bruton.*

For the reasons cited above, the Court cannot conclude that the admission of this testimony constituted a substantial constitutional deprivation.

F. *JURY INSTRUCTIONS.*

Petitioners argue that the trial court improperly refused to give various jury instruction suggested by them. The Court has reviewed each of these instructions and believes that the trial court used good judgment and insight in refusing to give these instructions. The Court believes that the instruction would not have helped the jury in its deliberations. Accordingly, Petitioners did not suffer a substantial constitutional deprivation regarding this issue.

IV. CONCLUSION.

As discussed above, the Court believes that Petitioners have failed to demonstrate that they suffered a substantial constitutional deprivation on any of the issues presented. Therefore, summary judgment in favor of Respondents is appropriate.

V. ORDER OF THE COURT.

NOW, THEREFORE, IT IS ORDERED that Respondents' motion for summary judgment be, and hereby is, GRANTED.

JUDGMENT

In accordance with the Memorandum of Decision and Order entered simultaneously with this Judgment,

IT IS ORDERED, ADJUDGED AND DECREED that:

(1) Respondents' motion for summary judgment is GRANTED;

(2) Petitioners' [sic] have and recover NOTHING in this action;

(3) This action be DISMISSED WITH PREJUDICE; and

(4) Each party shall pay their own costs.

APPENDIX B

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JIM ST. JOHN; CURTIS RENE PETERSON; CINEMA BLUE OF CHARLOTTE, INCORPORATED,

Plaintiffs-Appellants,

v.

NORTH CAROLINA PAROLE BOARD COMMISSION, Louis Columbo, Chairman; JOHN PATSEAVOURAS, Director of the State of North Carolina Parole Commission,

Defendants-Appellees.

No. 91-7581

Appeal from the United States District Court
for the Western District of North Carolina, at Charlotte.
Robert D. Potter, District Judge.
(CA-90-286-C-C-P)

Argued: December 2, 1991

Decided: January 29, 1992

Before PHILLIPS, MURNAGHAN, and WILKINS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Bradley Jay Shafer, Okemos, Michigan, for Appellants. Richard Norwood League, Special Deputy Attorney General, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Lee J. Klein, Okemos, Michigan; Nelson Casstevens, Charlotte, North Carolina, for Appellant. Lacy H. Thornburg, Attorney General of North Carolina, Raleigh, North Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellants, Jim St. John, Curtis Rene Peterson, and Cinema Blue of Charlotte, Inc., contend that their obscenity convictions in a North Carolina state court violated their constitutional rights under the First, Sixth and Fourteenth Amendments. After exhausting their state appellate remedies, St. John and Peterson sought habeas corpus relief in the United States District Court for the Western District of North Carolina under 28 U.S.C. § 2254, and Cinema Blue sought relief from payment of a $150,000 fine under 42 U.S.C. § 1983. The district court granted summary judgment for respondents, dismissing both the petition for writ of habeas corpus and Cinema Blue's action, with prejudice. Because we do not find that appellants' convictions violated any federal constitutional rights, *see Estelle v. McGuire,* ___ U.S. ___, 60 U.S.L.W. 4015 (Dec. 4, 1991), we affirm on the reasoning of the district court. *See St. John v. State of North Carolina Parole Comm'n,* 764 F.Supp. 403 (W.D.N.C. 1991).

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 2, 1992

No. 91-7581
CA-90-286-C-C-P

JIM ST. JOHN; CURTIS RENE PETERSON; CINEMA BLUE OF CHARLOTTE, INCORPORATED

Plaintiff-Appellants

v.

NORTH CAROLINA PAROLE BOARD COMMISSION, Louis Columbo, Chairman; JOHN PATSEAVOURAS, Director of the State of North Carolina Parole Commission

Defendants-Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

Appellants filed a petition for rehearing with suggestion for rehearing in banc. No member of the Court requested a poll on the suggestion for rehearing in banc, and the original judicial panel voted to deny the petition for rehearing.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Phillips and Judge Wilkins.

For the Court,

JOHN M. GREACEN
CLERK

APPENDIX D

STATE of North Carolina

v.

CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka Cinema Blue Adult Entertainment Center, aka Cinema Blue of Charlotte, aka Cinema Blue; Jim St. John; and Curtis Rene Peterson.

No. 8926SC765.

Court of Appeals of North Carolina.

June 5, 1990.

Defendants were charged in proper bills of indictment with multiple counts of dissemination of obscenity in violation of G.S. 14-190.1 and with common law conspiracy to disseminate obscenity. Each defendant was convicted by a jury on two counts of dissemination of obscenity and one count of common law conspiracy to disseminate. At the sentencing hearing, the trial court found factors in aggravation and mitigation with respect to each offense and concluded in each case that the aggravating factors outweighed the mitigating factors. From judgments imposing prison sentences totaling six years on each individual defendant and fining defendant Cinema Blue $150,000, defendants appealed.

Atty. Gen. Lacy H. Thornburg by Sp. Deputy Atty. Gen. Harold M. White, Jr., and Asst. Atty. Gen. Thomas J. Ziko, Raleigh, for the State.

Lee J. Klein, Okemos, Mich., for defendants, appellants.

Nelson Casstevens, Jr., Charlotte, for defendant, appellant Cinema Blue of Charlotte, Inc.

George Daly, Charlotte, for defendant, appellant Jim St. John.

Calvin Murphy, Charlotte, for defendant, appellant Curtis Rene Peterson.

HEDRICK, Chief Judge.

In their first two arguments on appeal, defendants contend the trial court erred in excluding expert testimony by Dr. Joseph Scott. Defendants sought to have Dr. Scott testify as to 1) the proper community standard for obscenity in Mecklenburg County and 2) the community acceptance of other sexually explicit materials "comparable" to those which defendants were convicted of disseminating. Defendants correctly point out that "appropriate expert testimony" may be offered "to explain to juries what they otherwise would not understand" in an obscenity case. *State v. Anderson*, 322 N.C. 22, 26-28, 366 S.E.2d 459, 463, *cert. denied*, ___ U.S. ___, 109 S.Ct. 513, 102 L.Ed.2d 548 (1988). However, the trial court has wide discretion in determining whether to admit expert testimony in such cases. *Id.* We have reviewed the record on appeal and find no abuse of discretion by the trial judge in excluding this testimony. Defendants' argument has no merit.

Defendants next argue that the trial court should have sustained their objection to "evidence of events at Cinema Blue in 1985." They claim that because the trial court decided to "dismiss charges [against defendants] for conduct that occurred in 1985," testimony by Captain

Thomas Barnes of the Charlotte Police Department regarding observations and purchases he made in 1985 at Cinema Blue was more prejudicial than probative. Thus, according to defendants, such testimony should have been excluded under G.S. 8C-1 Rule 703 [sic]. We disagree.

To support a charge of conspiracy to disseminate obscenity, the State is required to prove scienter on the part of the particular defendant. To satisfy this element of the offense, each defendant must have at least a general familiarity with the sexually explicit nature of the materials in question. *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Circumstantial evidence which suggests such familiarity is therefore admissible. In the instant case, testimony indicating that Cinema Blue had sold sexually explicit materials for several years prior to 1988 tends to show that the corporate defendant and the individual defendants, both of whom began working for Cinema Blue before 1988, were aware that the store was selling sexually explicit materials at the time of the alleged conspiracy. Consequently, the trial court properly allowed Captain Barnes' testimony.

In defendants' fourth argument, based on assignment of error number nine, they complain that "[t]he trial court erred in admitting testimony of arrests, plea bargains and prior convictions of Cinema Blue's clerks." Defendants claim this testimony violated the rule which bars convictions and guilty pleas by a codefendant from being admitted as evidence of a defendant's guilt. *State v. Campbell*, 296 N.C. 394, 250 S.E.2d 228 (1979). Nevertheless, our Supreme court has held that a guilty plea by a codefendant is admissible to show that the codefendant was not being treated too leniently in exchange for testifying against the defendant. *State v. Rothwell*, 308 N.C. 782, 303 S.E.2d 798 (1983). Furthermore, testimony concerning prior arrests, pleas bargains, and convictions by employees of Cinema Blue is admissible under G.S. 8C-1 Rule 404(b) if it tends to show motive, opportunity, intent, preparation, plan, or knowledge on the part of a defendant. In the case at bar, testimony by Grady Burr and David Schoch, two codefendants, was properly admitted under the rule in *Rothwell* to strengthen their credibility. Testimony by Mr. Schoch and former employee Ernest Smith regarding their past arrests and plea arrangements was properly allowed because it tends to show the intent and plan on the part of defendants Cinema Blue to engage in a conspiracy to disseminate obscenity.

Defendants also contend the trial court erred "in allowing testimony of hearsay declarations of a codefendant." They argue that David Schoch was improperly allowed to repeat "incriminating statements about Defendant St. John purportedly made to him by Defendant Peterson." The essence of these alleged statements was that defendant St. John was Schoch's new boss. Nevertheless, we find no conceivable prejudice to defendants resulting from their admission. Mr. Schoch's testimony, even absent the statements in question, clearly portrays his relationship with St. John as one between employee and boss. Defendants' assignment of error is therefore overruled.

Defendants next complain the trial court acted improperly by dismissing defendant St. John's motion to sever and by allowing the State to join all defendants and charges for one trial. Defendants point out that Mr. St.

John was not alleged to have participated in a conspiracy to disseminate until after April 1987, and they argue that denial of his motion to sever, in view of evidence admitted at trial regarding events in 1985, prejudiced his defense.

G.S. 15A-926(a) allows consolidation of separate offenses for trial when the offenses charged are "based on the same act or transaction or on a series of transactions connected together or constituting parts of a single scheme or plan." Subsection (b) similarly permits joinder of separate defendants for trial when the several offenses charged are transactionally related. This requirement is satisfied when the offenses in question all arose out of a single conspiracy. *State v. Silva,* 304 N.C. 122, 282 S.E.2d 449 (1981).

In addition to the transactional requirement, the trial court must determine that none of the defendants would be deprived of a fair trial by being tried together or by facing more than one charge at the same trial. *State v. Williams,* 74 N.C.App. 695, 329 S.E.2d 705 (1985). However, when the offenses are transactionally related, the trial court's ruling on a motion for joinder of severance is discretionary and, absent a showing of abuse, will not be disturbed on appeal. *State v. Wilson,* 57 N.C.App. 444, 291 S.E.2d 830, *cert. denied,* 306 N.C. 563, 294 S.E.2d 375 (1982); *State v. Lake,* 305 N.C. 143, 286 S.E.2d 541 (1982).

In the present case, all three defendants were charged as members of a single conspiracy to disseminate obscenity. The remaining charges were all for disseminating obscenity in some capacity and clearly arose out of this conspiracy. Thus, the proper standard for review by this Court is abuse of discretion. We have reviewed the record and find no such abuse by the trial judge in granting the State's motion for joinder or in dismissing defendant St. John's motion to sever. Defendant's argument has no merit.

Defendants next contend the trial court erred in its instructions to the jury. They complain that the court should have given several instructions proposed by defendants which address the scope of First Amendment protection and elements of the standard for obscenity. We have examined the instructions given by the trial judge and find them to be sufficient. The instructions proposed by defendants but refused by the trial court were not necessary to a proper determination on the issue of obscenity. Consequently, this assignment of error is overruled.

In assignment of error number seventeen, based on exceptions eleven through nineteen in the record, defendants claim the trial judge erred at sentencing by finding as a factor in aggravation that defendants "induced others to participate in the commission of" each offense of conspiracy to disseminate and dissemination as an accessory before the fact. Such findings, according to defendants, violated G.S. 15A-1340.4(a)(1) which provides that "[e]vidence necessary to prove an element of the offense [charged] may not be used to prove any factor in aggravation. . . . " We disagree.

While G.S. 15A-1340.4(a)(1) indeed prohibits basing an aggravating factor on circumstances essential to establishment of a defendants' guilt for a particular crime, our Supreme Court has indicated that many of the factors listed in the statute "contemplate a duplication in proof without violating [that] proscription. . . . " *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983). In the case of a criminal conspiracy, the State must show, by competent evidence, only that the defendant entered into an agreement with one or more other persons to do an unlawful act or to do a lawful act by unlawful means or in an unlawful manner. *State v. Massey*, 76 N.C.App. 660, 334 S.E.2d 71 (1985). Although essential evidence of the agreement may also suggest that the accused induced others to participate in the conspiracy, the fact that he did so is not required to establish his guilt as a conspirator. With respect to a conviction for being an accessory before the fact, the State must show that defendant either gave advice or counsel to the principal or did some act which aided the principal in the commission of the offense. Once again, however, it does not matter that certain evidence essential to establish the giving of aid or advice by defendant also tends to show he persuaded the principal to commit the offense in question. Such duplication in proof does not prohibit the trial judge from using the evidence to find a factor in aggravation. We therefore conclude that the trial judge did not err at sentencing.

Defendants next argue that the trial court erred by denying their motions to dismiss because "[i]nsufficient evidence [was] presented to support conspiracy or accessory before the fact charges." They contend that the State failed to produce any evidence of "scienter" to support defendants' convictions.

In ruling on a motion to dismiss pursuant to G.S. 15A-1227, the trial court must consider the evidence presented in the light most favorable to the State, and the

State must be given the benefit of every reasonable inference to be drawn therefrom. *State v. Hutchins*, 303 N.C. 321, 279 S.E.2d 788 (1981). If there is evidence, direct or circumstantial, from which a jury could reasonably find that defendant had committed the offense charged, the motion to dismiss must be denied. *State v. Simmons*, 57 N.C.App. 548, 291 S.E.2d 815 (1982). In the present case, the record tends to show that the Cinema Blue store sold only sexually explicit materials and that much of these materials were in plain view of anyone who entered the store. The record also indicates that the individual defendants were supervisors of the store and had visited the store on a number of occasions for business purposes. We believe that this evidence constituted sufficient proof of scienter to withstand a motion to dismiss. Defendants' argument has no merit.

Finally, defendants assign as error the trial court's denial of several pretrial motions to dismiss the charges against them arguing the G.S. 14-190.1 is unconstitutionally overbroad and vague. Nevertheless, this Court had held G.S. 14-190.1 to be neither vague nor overbroad because of the specificity with which it defines which types of "sexual conduct" are considered obscene. *Cinema I Video, Inc. v. Thornburg*, 83 N.C.App. 544, 351 S.E.2d 305 (1986), *aff'd*, 320 N.C. 485, 358 S.E.2d 383 (1987). This argument has no merit.

Defendant had a fair trial free from prejudicial error.

No error.

JOHNSON and EAGLES, JJ., concur.

APPENDIX E

No. 267P90 TWENTY-SIXTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA v CINEMA BLUE OF CHARLOTTE, INC., a North Carolina Corporation, aka CINEMA BLUE ADULT ENTERTAINMENT CENTER, aka CINEMA BLUE OF CHARLOTTE aka CINEMA BLUE; JIM ST. JOHN; and CURTIS RENE PETERSON	From Mecklenburg (8926SC765)

ORDER

Upon consideration of the petition filed by Defendants for Writ of Supersedeas and Temporary Stay of the judgment of the Court of Appeals, in this matter, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

> "Stay dissolved. By order of the Court in conference, this the 26th day of July 1990.
>
> s/ Whichard, J.
> For the Court"

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by Defendants in this matter pursuant to G.S. 7A-30, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the appeal is

"Dismissed by order of the Court in conference, this the 26th day of July 1990.

s/ Whichard, J.
For the Court"

Upon consideration of the petition filed by Defendants in this matter for discretionary review of the decision of the North Carolina Court of appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 26th day of July 1990.

/s/Whichard, J.
For the Court"

NCCLU-LF and PHE, Inc.'s Motion for Leave to File Amicus Curiae Brief:

"Dismissed as moot by order of the Court in conference, this the 26th day of July 1990.

s/ Whichard, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 31st day of July 1990.

J. GREGORY WALLACE
Clerk of the Supreme Court

/s/ Peggy N. Byrd
Assistant Clerk

Copy to:

North Carolina Court of Appeals
Klein & Shafer, Attorneys at Law, For Cinema Blue of Charlotte
Mr. Harold M. White, Jr., Assistant Attorney General, For the State
Mr. R. Max Blackburn, Clerk of Superior Court
Mr. Peter S. Gilchrist, III, District Attorney

Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Mead Data Corporation
Casstevens, Hanner, Gunter & Gordon, Attorneys at Law, For Cinema Blue of Charlotte, Inc.
Murphy & Chapman, Attorneys at Law, For Curtis Rene Peterson
Merryman, Dickson, Rawls & Ledford, Attorneys at Law For Jim St. John
Mr. Edward B. Foley, Attorney at Law, for Amicus
Mr. William G. Simpson, Jr., Attorney at Law, for Amicus

APPENDIX F

UNITED STATES CONSTITUTIONAL PROVISIONS

AMENDMENT I

Congress shall make no law. . . . abridging the freedom of speech, or of the press. . . .

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right. . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor . . .

AMENDMENT XIV

Section 1. No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.C.G.S.

§ 14-190.1. Obscene literature and exhibitions.

(a) It shall be unlawful for any person, firm or corporation to intentionally disseminate obscenity. A person, firm or corporation disseminates obscenity within the meaning of this Article if he or it:

(1) Sells, delivers or provides or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene; or

(2) Presents or directs an obscene play, dance or other performance or participates directly in that portion thereof which makes it obscene; or

(3) Publishes, exhibits or otherwise makes available anything obscene; or

(4) Exhibits, presents, rents, sells, delivers or provides; or offers or agrees to exhibit, present, rent or to provide: any obscene still or motion picture, film, filmstrip, or projection slide, or sound recording, sound tape, or sound track, or any matter or material of whatever form which is a representation, embodiment, performance, or publication of the obscene.

(b) For purposes of this Article any material is obscene if:

(1) The material depicts or describes in a patently offensive way sexual conduct specifically defined by subsection (c) of this section; and

(2) The average person applying contemporary community standards relating to the depiction or description of sexual matters would find that the material taken as a whole appeals to the prurient interest in sex; and

(3) The material lacks serious literary, artistic, political, or scientific value; and

(4) The material as used is not protected or privileged under the Constitution of the

United States or the Constitution of North Carolina.

(c) As used in this Article, "sexual conduct" means:

(1) Vaginal, anal, or oral intercourse, whether actual or simulated, normal or perverted; or

(2) Masturbation, excretory functions, or lewd exhibition of uncovered genitals; or

(3) An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a nude person or a person clad in undergarments or in revealing or bizarre costume.

(d) Obscenity shall be judged with reference to ordinary adults except that it shall be judged with reference to children or other especially susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such children or audiences.

(e) It shall be unlawful for any person, firm or corporation to knowingly and intentionally create, buy, procure or possess obscene material with the purpose and intent of disseminating it unlawfully.

(f) It shall be unlawful for a person, firm or corporation to advertise or otherwise promote the sale of material represented or held out by said person, firm or corporation as obscene.

(g) Violation of this section is a Class J felony.

(h) Obscene material disseminated, procured, or promoted in violation of this section is contraband. (1971, c. 405, s. 1; 1973, c. 1434, s. 1; 1985, c. 703, s. 1.)

N.C.G.S. 8C-1

Rule 401. Definition of "relevant evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly or by these rules. Evidence which is not relevant is not admissible. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (1983, c. 701, s. 1.)

N.C.G.S. 8C-1

Rule 702. Testimony by experts.

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion. (1983, c. 701, s. 1.)

28 U.S.C.

§ 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

---

28 U.S.C.

§ 2254. State Custody; remedies in Federal Courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct unless the application shall establish or it shall otherwise appear, or the respondent shall admit –

> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) That the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;
>
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State Court proceeding;
>
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
>
> (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
>
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to

> a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the application challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

---

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX G

Final Report of the Mecklenburg County North Carolina Film Evaluation Project

---

Date: February 19, 1989

Prepared For: Mr. Lee Klein, Attorney at Law
8252 East Lansing Rd
Suite 101
Durand, MI 48429

Prepared By: Dr. Edward Donnerstein, Chairman &
Dr. Dan Linz
Communication Studies
University of California, Santa Barbara

INTRODUCTION

The purpose of this study was to determine the contemporary community standards of adults in Mecklenburg County, North Carolina regarding sexually explicit material (as here and after defined) both generally, and with regard to five specifically identified films and a magazine, and their (the five films and a magazine) appeal to a prurient interest and their patent offensiveness. Randomly selected residents were obtained to view the sexually explicit films and the sexually explicit magazine. These residents then responded to a set of questions designed to determine the appeal of the materials viewed to a prurient interest (an unhealthy shameful, morbid interest in sex) and their patent offensiveness (whether the material so affronted contemporary community standards as to go substantially beyond the level of tolerance regarding depiction and representation of sexual conduct).

PROCEDURE

Overview of Procedure

This study was conducted in 6 phases: 1) subject recruitment over the phone, 2) pre-film questionnaire administration, 3) film viewing, 4) post-film questionnaire administration, 5) magazine viewing, and 6) post magazine questionnaire administration.

The Sample

A sample of Mecklenburg county residents were contacted by telephone through random digit dialing. A list of random digits, not weighted by prefix, was obtained from *Survey Sampling, Inc.*, Fairfield, Connecticut. Despite the fact that a nonweighted sample produces more nonworking numbers and thus entails a more time consuming subject contact procedure, we chose this procedure due to the fact that by proceeding in this manner it gave us greater assurance that a *truly* random sample of individuals could be selected from Mecklenburg county.

Questionnaire Development

Two questionnaires were developed one to be administered after the subjects viewed a movie, the other to be completed after subjects viewed the magazine. The purpose of both questionnaires was to assess the patent offensiveness and prurient appeal of the viewed material.

The language of the questionnaires was drafted in accordance so as to be both scientifically sound and consistent with legal definitions applicable to the law of obscenity in North Carolina.

Contacting Subjects

Arrangements were made with J. Bell and Associates, a professional market research and analysis firm in Charlotte, North Carolina to contact subjects for participation in the study. Instructions were give [sic] to J. Bell and Associates regarding the methodology to be employed in recruiting potential study participants. Potential participants were administered a short interview over the phone. This interview involved four components:

1) Selection of an adult respondent in the household.
2) Assessment of demographic characteristics including: age, education, race, sex, and media consumption habits.
3) Subject recruitment "to view a movie" . . . "and fill out a questionnaire about it?"
4) Subject recruitment to view "adult X-rated sexually explicit films."

(See Appendix 1 and 2 for the telephone recruitment questionnaire and instructions to the telephone interviewers)

Once subjects agreed to participate in the study, they were informed that they would receive $50.00 upon completion of the project, which, they were told, would take about two and one half-hours. Participants were then told to report to the 8th floor of the Law Building, 730 East Trade Street, in downtown Charlotte.

A total of 614 adults completed the initial telephone interview. Of these, 380 (61.9 percent) indicated that "yes," they would be willing to participate in a film viewing project; 8 (1.3 percent) respondents indicated they were "not sure" and; 226 (36.8 percent) declined participation.

A total of 284 (73 percent of those indicating "yes" and "not sure" from above) agreed to view an X-rated video. One hundred and four respondents (27 percent) declined to participate at this stage. Of these 284 "yes" respondents, 244 subjects were scheduled for a film viewing session. (Forty potential participants were lost at the time of the phone interview due either to scheduling difficulties, or other factors such as unwillingness to come down town in the evening).

Twenty-two subjects were scheduled but were later contacted and their viewing sessions cancelled. It was necessary to cancel these sessions because of a 4th Circuit Court Appeals ruling which stayed a preliminary injunction of the Federal District Court in N.C. pending the resolution of an appeal enjoining the law enforcement departments of N.C. from prosecuting any experts or agents for showing sexually explicit material to adults of Mecklenburg Co.

A total of 132 subjects reported for their film viewing session. One subject left once the film began and two were dismissed with payment because all video viewing set-ups were being used simultaneously. **A total of 129 subjects participated in the study.**

Assessing Volunteer Bias

It is important to point out that some groups of subjects were slightly more willing to participate in the film viewing study than others once they had been informed they may be asked to watch an X-rated film. **Table 1** shows the number and percentage of respondents who agreed to participate in the study broken down by the primary demographic variables assessed in the Phone interview – age, sex, race and education. By looking at the "agree to participate" category and comparing the percentages in this column for each demographic category we note that nonwhites were slightly more likely to volunteer than whites, males more than females and younger persons more likely to volunteer than older persons. Respondents with a moderate level of education were slightly more likely to volunteer than respondents with either higher or lower levels of education.

Comparing subjects in this study to the 1987 survey of Mecklenburg County residents

Concern existed as to the possibility of "volunteer" bias because of the differences noted above in the demographic categories. This bias, if it existed appears to be superficial, and, in any event, was substantially minimized by the time of completion of the study. Those subjects who completed the study were more demographically representative of the population as a whole than were the group of respondents who indicated that they would volunteer to participate in a study involving X-rated material. **Table 2** illustrates this point. This table compares the percentage of subjects within each demographic category for our sample of 129 study participants with percentages within the same demographic categories obtained in The Random Digit Dial Survey of Mecklenburg County, North Carolina – 1987, conducted by Dr. Joseph E. Scott (hereafter referred to the 1987 Survey). The results of the survey as well as a copy of the survey instrument are included in **Appendix 3.**

Table 2 shows the subject assignment to film types by their **Race** (*Black or White*), **Sex** (*Male or Female*), **Age** (*40+ or 39 and under*), and **Education** (*13+ or 12th grade and below*). In the table each of these are compared to the 1987 Survey. This table indicates that in terms of race and education the sample used in the film viewing study differed from the larger 1987 survey sample by only two percentage points. The present study had a slightly higher percentage of males as participants than the previous survey. While the proportions were nearly equal for younger participants, there was an approximate 10 percent difference in the older age categories with the present study under representing older persons slightly.

Several statistical techniques are available which permit us to take these slight differences into account for each of the findings presented below. We have contacted Dr. Kenneth Land, of Duke University, North Carolina and have submitted our data to him for these analyses.

Assigning subjects to film viewing conditions

The film evaluation portion of the study began on Saturday, January 21, 1989 at 2:00 P.M. and was completed on February 8, 1989. A seven step procedure was followed for handling subjects:

1. Subject completed a consent form.
2. Subject completed pre-film questionnaire.
3. Subject watches movie.
4. Subject completed post questionnaire.
5. Subject looks at magazine.
6. Subject completed magazine questionnaire.
7. Subject is debriefed and paid.

Dr. Larry Lance, University of North Carolina – Charlotte, in addition to two research assistants, were responsible for the daily operation of the film viewing study. Dr. Lance and the [sic] his research assistants were instructed to adhere to the following subject protocol:

> You will receive a list of the subjects who will be showing up for a given day from the survey research firm who called them. This list should contain 4 pieces of demographic information: Race (black, white), sex (male, female), education (13+, 12-) and age (40+, 39-). If it does not contain this information get it either from those who do the calling or get it from their responses to the pre-movie questionnaire. You are to keep a separate diagram for each film group. Write the name of the film on the top of the form. Indicate with a letter (a, b, c etc.) each subjects' characteristics on the diagram before they arrive. In other words a black male, age 51 with less than 12 years of education shows up. He is your first subject. Place an "a" in the "black" category, an "a" in the 40+ category an "a" in the "male" category and an "a" in the 12- category for education. **Don't lose this form.**
>
> At first, the movie you have subjects view will be up to your discretion, you need only spread people of different characteristics around

> for each of the films. Soon however your chart will begin to fill up and you will begin to notice gaps in certain demographic categories. When this happens start to add people with the missing characteristics to the film groups that appear to need them. Remember the idea is to have each group have some males, some females, some blacks, some whites, some over 40 some under, etc.
>
> Never hesitate to call us if you have any questions, In fact, call us every two days and let us know how the cells are filling up.

The subjects were assigned to view either one of five sexually explicit films (*Unnatural Phenomenon 2, The Big Switch, How to Get A 'head', Penetration 2, Cumshot Revue Vol. 4*) or a nonexplicit control film (*Nothing in Common*). Table 3 presents the total number of subjects in each film condition.

Obtaining informed consent

Prior to participating in the study each subject was given a consent form to read over and sign. This document informed subjects that they would be viewing a sexually explicit X-rated adult video and a magazine of the same content. Those subjects who were to view one of the five X-rated films were given the form titled: *Agreement Form for X-Rated Video Viewing* (**Appendix 4**) while those subjects who were to be shown the control film were given the form titled: *Agreement Form for Film Viewing* (**Appendix 4**).

Prefilm Questionnaire Administration

After being assigned to their film condition, subjects were given the pre-film questionnaire and instructed to take it to one of ten separate video viewing rooms and complete it. (**See: Film Evaluation Project Questionnaire, Appendix 5**). On this questionnaire subjects were asked to indicate length of residence in Mecklenburg county, newspaper subscription, video movie consumption, cable subscription, political affiliation, political attitudes, religiosity, religious service attendance, attitudes about current events, education level, age, religious affiliation. Most important subjects were given the following instruction and asked three questions:

> **The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, such as sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.**
>
> Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?
>
> Tolerated 1 2 3 4 5 6 7 8 Not Tolerated
>
> Do you believe you *should* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?
>
> Definitely Yes 1 2 3 4 5 6 7 8 Definitely No
>
> Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing

this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Film Viewing

Upon completing the prefilm questionnaire subjects were instructed to return it to one of the staff members. The subject was then taken back to the viewing room and shown how to turn off the Video Cassette Recorder. Subjects were instructed that when the film was over they were to turn off the VCR and report to the staff person. The staff person then started the VCR and left the room.

Post-film Questionnaire

When subjects returned from their movie viewing room they were given a post-film questionnaire and instructed to return to their room to complete it. (See: **Post Film Viewing Questionnaire, Appendix 6**).

This questionnaire assessed subject attitudes on a number of current issues including gun control, censorship and religious tolerance. Most importantly they were given the following instructions and asked the following eight questions:

> **In the first questionnaire you filled out, we asked you about X-rated videos, adult movies, and adult magazines. We said that the nudity and sex shown in these adult materials include: nude bodies and close-up graphic depictions of a variety of sexual activities. This includes: sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.**

Was the move you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Definitely No 1 2 3 4 5 6 7 8 Definitely Yes

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

Have you ever viewed a film or video like the one you just saw?

Yes _____ No _____

If you answered Yes, about how many times in the last 5 years? _____

Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 1 2 3 4 5 6 7 8 Not Tolerated

Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Definitely No 1 2 3 4 5 6 7 8 Definitely Yes

Would viewing this type of video material appeal to your unhealthy, shameful or morbid interest in sex?

> Definitely Yes 1 2 3 4 5 6 7 8 Definitely No
>
> Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?
>
> Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Magazine Viewing and Magazine Questionnaire Administration

After completion of the post-film questionnaire subjects were given a packet which contained the magazine *Pregnant and Sexy* and a questionnaire. They were instructed to take the packet back to their room, look at the magazine, and complete the questionnaire. (See: **Magazine Questionnaire, Appendix 7**). This questionnaire included exactly the same questions as the post-film questions listed above (except for the first question) and were given the following instructions:

> **The next few questions deal with the X-rated magazine which you just viewed. You may feel exactly the same way about the magazine you just examined as you did about the video which you viewed. If you feel the same way it is okay to give the same answers you gave on the questionnaire about the video. If you feel differently about the magazine, you can of course indicate that also.**

Subject Payment

Once the post-magazine questionnaire had been completed subjects returned the packet to the staff person. Subjects were paid $50.00 and thanked. Subjects were then asked if they had any questions about [sic] study.

The research assistants were instructed to answer each question honestly and completely.

Control film subjects

Except for the magazine viewing phase of the study and the fact that they saw a nonexplicit film (*Nothing in Common*), control subjects were treated in an identical manner to the sexually explicit film viewing subjects. In addition, the control subjects post-film questionnaire did not include questions on whether the film they viewed met the definition of an "X-Rated" film or whether the film could be used for medical sexual therapy. (See: **Post Questionnaire Appendix 6, (note [C] in upper right corner).**)

RESULTS

Subject Characteristics

Table 4 presents the percentages and means (where appropriate) for each question asked on the pre-film questionnaire for the entire sample of 129 subjects. On the average subjects in the sample have lived in Mecklenburg county for about 19 years, the majority of people subscribe both to a daily newspaper and cable television. Over 50 percent of the persons in the sample consider themselves to be politically "conservative" to "very conservative" and over 80 percent say they are "somewhat" to "very" religious. Most had completed high school, over half had some college or completed a college education, and over half were married. The ages of subjects ranged from 18 to 69 years. The majority had an annual income over $30,000 per year although at least 20 percent indicated a yearly income under $20,000 a pear.

Table 4a presents the percentages and means (where appropriate) for each question asked on the pre-film questionnaire for the sample of 44 subjects who viewed the films *Cumshot Review Vol. 4* and *The Big Switch*. On the average subjects in the sample have lived in Mecklenburg county for about 18 years, the majority of people subscribe both to a daily newspaper and cable television. Forty-five percent of the persons in the sample consider themselves to be politically "conservative" to "very conservative" and over 80 percent indicate they are "somewhat" to "very" religious. Most had completed high school, over half had some college or completed a college education, and over half were married. The ages of subjects ranged from 18 to 62 years. The majority had an annual income over $30,000 per year although at least 20 percent indicated a yearly income under $20,000 a year.

Comparison of Attitudes About Sexually Explicit Material Between 1987 Survey and The Film Viewing Sample

Table 5 presents a comparison of percentages for responses to three questions asked in the 1987 Survey with responses from the current film study subjects. In that survey questions were specifically addressed to: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex. Identical questions were asked of the film viewing study participants both *before and after film viewing* the films.

A comparison of the 1987 Survey responses and the *pre-film* viewing responses of the film viewing sample indicated that 58 percent of the 1987 Survey respondents said their community did not tolerate adult movies and magazines showing nudity and sex compared to 39 percent in the current study. Thirty one percent of the 1987 Survey respondents said that they should not be able to see such materials compared to 27 percent answering the pre-film questionnaire in the present study. However, only 20 percent of the respondents in the 1987 Survey believed that such materials appeals to an unhealthy, shameful of [sic] morbid interest in sex while 45 percent indicated this on the pre-film questionnaire in the current study.

Table 5a presents a comparison of percentages for responses to three questions asked in the 1987 Survey with responses from the film viewing subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch.* A comparison of the 1987 Survey responses and the *pre-film* viewing responses of the film viewing sample indicated that 58 percent of the 1987 Survey respondents said their community did not tolerate adult movies and magazines showing nudity and sex compared to 48 percent in the current study. Thirty one percent of the 1987 Survey respondents said that they should not be able to see such materials compared to 27 percent answering the pre-film questionnaire in the present study. However, only 20 percent of the respondents in the 1987 Survey believed that such materials appeals to an unhealthy, shameful of [sic] morbid interest in sex while 50 percent indicated this on the pre-film questionnaire in the current study.

Comparison of Subject Responses Before and After Film Viewing

Table 5 also shows the responses of subjects to the three questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex, *after* they had viewed one of the films. It is important to note that subjects were instructed to answer these questions *only* with reference to the film they had viewed that day. There were no significant changes in *perception* of community tolerance or the belief that they should be able to see this type of material after the subjects had the opportunity to view the films. However, there was a substantial drop in the percentage of subjects who said that the material appealed to a shameful, morbid or unhealthy interest in sex after viewing the films. Forty-five percent of the subjects believed that such material appealed to morbid, shameful or unhealthy interest in sex before seeing the film. After they viewed the film the percentage dropped to only 19 percent.

Table 5a also shows the responses of subjects to the three questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex, *after* film viewing for the subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch.*. There were no significant changes in perception of community tolerance or the belief that they should be able see this material *after* the subjects had the opportunity to view the films. However, there was a substantial drop in the percentage of subjects who said that the material viewed appealed to a shameful, morbid or unhealthy interest in sex after viewing the films. Fifty percent of the subjects believed that [the described material] would appeal to morbid, shameful or unhealthy interest in sex before actually seeing a film. After subjects' viewed the films, this percentage dropped to only 18 percent.

Table 6 presents the before and after film comparisons on the questions concerning: 1) whether it is or is not tolerated in the community for adults to see adult magazines and movies, 2) whether or not the respondent should be allowed to see such materials, and 3) whether such materials appeal to a shameful, unhealthy or morbid interest in sex **broken down by each film viewing group.** The same results are found for each group as was found when the groups were considered together. For each of the sexually explicit film groups there was no significant change for the questions concerning perceptions of community tolerance and the belief that one should be able to see such materials. However, there was a significant decline in the percent of subjects who indicated that such materials appeal to a shameful, unhealthy or morbid interest in sex for each film group after they viewed the films.

Table 6a presents the before and after film comparisons **broken down by each film viewing group** for the film viewing subjects who viewed subjects who viewed the two films *Cumshot Revue Vol. 4* and *The Big Switch.* The same results are found for both groups as was found when the groups were considered together. For each of the sexually explicit film groups there was no significant change for the questions concerning perceptions of community tolerance and the belief that one should be able to see such materials. However, there was a significant decline in the percent of subjects who indicated that such materials appeal to a shameful unhealthy or morbid interest in sex for each film group after they viewed the films. For the film *Cumshot Revue Vol. 4* the percentage dropped from 50 to 10 percent. For the film *The Big Switch* the percentage dropped from 54 to 25 percent. Statistical tests indicate that these differences were highly reliable (t=3.63 and t=3.26, $p<.002$ and $p<.004$ respectively).

Establishing a Community Standard by Summing Individual Responses

In order to arrive at a determination of the degree to which the average adult in Mecklenburg County tolerates adult movies, video cassettes and magazines showing explicit sexual conduct, it is useful to approach the problem from the point of view of obtaining individual opinions about what people believe they should be allowed to view and using the summation of these individual opinions to represent the average response. An analogy, not involving obscenity might be illustrative. We would be hesitant, as social scientists, to say that we can tell anything useful about the level of tolerance of a new seat belt law in the State by asking a sample of people to indicate what they *think* the level of acceptance for the new law is in their community – say on a 1 to 8 scale and then reporting on these results. A far more accurate approach would be to measure the level of acceptance for the law for each individual in the sample – say by asking if the respondent how willing he or she is to follow the law and buckle up – again on a 1 to 8 scale. This approach has three distinct advantages: First, subjects are asked to report on the specific behavior that they think they would be willing to engage in (wearing a seatbelt) rather than reporting on some vaguely defined standard of acceptance. They are asked to report on their own behavior and what they should be allowed to do rather than guessing about the community as a whole thinks should be done; Third, once each individual response has been noted, we can look at them collectively over all of people in the sample. Calculating the mean or compiling percentages for these individual responses gives us the "average" level of acceptance for the new law.

The same argument applies to subjects *perceptions* of community tolerance versus the average response of persons to a question about what they would personally tolerate. As social scientists we place far more confidence in a procedure whereby we first ask people if they should personally be free to choose or rent a movie (a specific behavior), and then sum these individual responses in order to "take the average" (or report the percentage agreeing that the behavior should be allowed) then a procedure whereby people are asked to report on what they *perceive* what the average person would tolerate.

Analyses of responses to three questions included in the post-film questionnaire illustrates this point, and may provide us with a better understanding of what the community tolerates. We asked subjects if they thought it is, or is not, tolerated in their community for the average adult to obtain and see adult movies like the one they just viewed. Fifty-five percent of the subjects who viewed *Cumshot Revue Vol. 4* said "yes" this adult movie is tolerated in their community. Fifty-eight percent said the same for the film *The Big Switch.* These percentages jump to 65 percent and 79 percent, respectively, when subjects are asked: "Do you think your neighbor, or you if you wanted to do so, should be free to choose to rent the movie you viewed today?" Similarly, the percentages rise to 75 percent and 71 percent when subjects were asked: "Do you believe you should be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?"

These analyses indicate that a much lower percentage of people think the hypothetical "community" tolerates the films they just viewed than is the case when people are asked to report on what they personally tolerate – in some cases by a factor of 20 percent. If we define community tolerance as the summation of individual responses about what people personally would tolerate, we would have to conclude that the community by a margin of 3 to 1 tolerates these materials.

Further Substantiation of the Findings

In order to have even higher confidence in our results, the responses to additional questions must be considered. First, concern existed as to whether or not the subjects, when completing the pre-viewing questionnaire, had in mind those type of graphic depictions of sexual conduct that were actually contained in the film that they subsequently saw when they responded to the pre-viewing questionnaire. This concern went directly to the adequacy of the description of the content and character of the sexually explicit material about which they were questioned. The possibility existed that the subjects perception, based on this description, was different in content or character than the actual material. In order to rule out this concern, we asked them if the movie they viewed was what they had expected to see given the definition that had been provided in the pre-movie questionnaire.

Table 7 shows the percentage of subjects who felt that the movie they had just seen was, or was not, what they expected to view. When we considered their responses across all of the films, 88 percent of the subjects indicated that the materials viewed were, in fact, what they had in mind when responding to the pre-movie questionnaire. Each film group's response mirrored these results. In addition, 75 percent of the subjects indicated that they had seen a film like the one they just "seen today" sometime before. In fact, subjects reported seeing an average of 9.5 films "like the one you just saw" in the last five years (See **Table 8**). We conclude that subjects are very familiar with materials like those at hand and these materials conformed to the definition given to subjects in the pre-film questionnaire.

Further concern existed as to the questions that attempted to measure the communities level of tolerance of, and prurient appeal to depictions of sexually explicit material. Experience has shown that the best way to tap a subject's cognitions about a topic is to ask the same question a number of different ways. It could be argued that the three key questions (as referenced above in the procedure section) may not have been sensitive enough to fully measure the extent of subjects feelings and beliefs about sexually explicit material. To address this possible concern, we devised and included additional questions which asked the subjects about their neighbor. These questions were: 1) If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor? 2) Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today? 3) Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

The results of analysis of these questions can also be found in **Table 7**. These results are consistent with the results from our other questions concerning community tolerance. The results indicate that the vast majority of subjects do not see anything "wrong" with their neighbor renting the videocassette they had just viewed, nor would they feel that this material would appeal to their neighbor's unhealthy, shameful or morbid interest in sex if he or she rented this video. The vast majority also believe they themselves and their neighbor should have the right to rent this material. We therefore conclude that we have adequately measured subjects' perceptions of community tolerance and appeal to an unhealthy, shameful and morbid interest in sex.

Table 7a shows the percentage of subjects shows the percentage of subjects [sic] who felt that the movie they had just seen (either *Cumshot Revue Vol. 4* and *The Big Switch.*) was, or was not, what they expected to view. We considered their responses across all of the films, 80 percent of the subjects indicated that the materials viewed were, in fact, what they had in mind when responding to the pre-movie questionnaire. Each film group's response mirrored these results (90 percent for *Cumshot Revue Vol. 4* and 71 percent for *The Big Switch.*). In addition, 66 percent of the subjects indicated that they had seen a film like the one they just "seen today" sometime before. In fact, subjects reported seeing an average of 6.1 films "like the one you just saw" in the last five years (See **Table 8a**). We conclude that subjects are very familiar with materials like those at hand and these materials conformed to the definition given to subjects in the pre-film questionnaire.

Further concern existed as to the questions that attempted to measure the level of community tolerance of depictions of sexually explicit material, and potential appeal to prurient interest. Experience has shown that the best way to tap a subject's cognitions about a topic is to ask the same question a number of different ways. It could be argued that the three key questions (as referenced above in the procedure section) may not have been sensitive enough to fully measure the extent of subjects feelings and beliefs about prurient interest and community tolerance. To address this possible concern, we devised and included additional questions which asked the subjects about their neighbor. These questions were: 1) If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor? 2) Do you think you neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today? 3) Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

The results of analysis of these questions can also be found in **Table 7a.** These results are consistent with the results from our other questions concerning community tolerance. The results indicate that the vast majority of subjects do not see anything "wrong" with their neighbor renting the videocassette they had just viewed, nor would they feel that this material would appeal to their neighbor's unhealthy, shameful or morbid interest in sex if he or she rented this video. The vast majority also believe they themselves and their neighbor should have the right to rent this material. We therefore conclude that we have adequately measured subjects' perceptions of community tolerance and appeal to an unhealthy, shameful and morbid interest in sex.

Finally, it is necessary to rule out the possibility that answering the questions abut prurient appeal and patent offensiveness twice, once in the pre-film questionnaire and again in the post-film questionnaire, might have caused subjects to think more carefully about these issues than they normally would (a testing effect bias). It may be the case that the significant change from pre to post film viewing on the questionnaire item about unhealthy, shameful or morbid interest in sex was the result of subjects giving this question further consideration from the time of completing the pre-film questionnaire to the time they completed the post-film questionnaire, and not the result of changing their opinions because they had seen the film. To test this possibility we compared the responses of the neutral film control group subjects before and after the film on this questionnaire item. The results of this statistical test revealed *no* statistically significant changes between pre and post evaluations for the control group on the patent offensiveness questions (t = 1.15, p>.26). The fact that we find significant changes in the subjects who view sexually explicit films but no statistically significant change for control subjects demonstrates that the observed changes were the result of viewing the movies and not an artifact of the testing situation.

Analyses of Post-Magazine Questionnaire Results

Table 9 presents the results of subject responses to the *Magazine Questionnaire.* These results are presented for each film group and the for all subjects (regardless of film groups assignment) who viewed the magazine (*Pregnant and Sexy*). It is important to remember that *only* subjects who viewed one of the X-rated films were shown the magazine and completed the post-magazine questionnaire. The results indicate that, overwhelmingly, subjects felt that they should be able to view sexual acts like those depicted in the magazine (74 percent indicating "yes" to this question). When asked if the magazine appealed to a prurient interest, 78 percent indicated that the content of the magazine did not appeal to their morbid, unhealthy, shameful interest in sex. Further, 68 percent indicated viewing this magazine would not appeal to their neighbors' morbid, unhealthy, shameful interest in sex. Nearly half of the subjects (45 percent) indicated that they had seen a magazine like the one shown to them before. On the average, subjects reported having viewed nearly 4 magazines of this type over the last five years.

SUMMARY

The results of this study demonstrate the following:

1. That the particular films and magazine viewed by the participants do not appeal to a shameful, morbid, or unhealthy interest in sex to the average adult in Mecklenburg County, North Carolina. This conclusion is based on the results of various questions asked of the participants to determine the same, including subjects' opinions before and after they view the films in question. We see a substantial shift in opinions before and after viewing the films. Substantially fewer people felt the films appealed to a shameful, morbid or unhealthy interest in sex *after* they had an opportunity to see them than before.

2. That the particular films and magazine viewed by the participants are not patently offensive, i.e. they do not go substantially beyond the customary limits of candor (tolerance) in Mecklenburg County, North Carolina in depictions of sex. This conclusion, like before, is based on responses by participants in answers to questions relating to same.

3. The analyses indicate that a much lower percentage of people think the "community" tolerates the films they just viewed than is the case when people are asked to report on what they personally tolerate. If we assume that the summation of individual responses about what people personally would tolerate is a better indication of what the average person tolerates than asking them to

speculate on what others in the community tolerate, we would have to conclude that the community is quite tolerant of these materials.

Table 1

Comparison of Subjects who Agreed or Did Not Agree to Participate in X-rated Portion of Study as a Function of Age, Race, Sex, and Education

Race	**Participate**	**Not Participate**	**Total**
White	70%(1986)	30%(81)	100%(267)
Black	88%(97)	12%(13)	100%(110)
Sex			
Male	85%(115)	15%(21)	100%(136)
Female	70%(168)	30%(73)	100%(241)
Education			
12 Years or Less	73%(101)	27%(37)	100%(138)
13-15	82%(80)	18%(17)	100%(97)
16 or More	72%(102)	28%(39)	100%(141)
Age			
18-39	80%(177)	20%(43)	100%(220)
40+	67%(105)	33%(51)	100%(156)

Table 2

Comparison of Demographic Characteristics for Film Study Participants and 1987 Survey Respondents

(All Numbers are in Percent %)

	RACE		SEX		AGE			EDUCATION		
	Black	White	Male	Female	18-29	30-49	50+	12-	13-15	16+
Current Study	24	76	55	45	29	56	15	33	33	34
1987 Survey	22	78	46	54	34	41	25	34	34	32
Films										
Unnatural Phenomenon	16	84	60	40	36	56	8	32	28	40
Cumshot Revue Volume Four	20	80	45	55	45	45	10	30	30	40
The Big Switch	37	63	63	37	29	63	8	33	46	21
How to Get A'head'	25	75	60	40	5	75	20	45	15	40
Penetration 2	19	81	53	47	38	38	24	14	52	33
Control Film Nothing in Common	26	74	47	53	16	63	21	42	26	32

Table 3

Breakdown By Number of Individuals in Each Film Group

		Race		Sex		Age		Education	
FILM		Black	White	Male	Female	40+	39-	13+	12-
Unnatural Phenomenon	(N=25)	4	21	15	10	7	18	17	8
Cumshot Revue Volume Four	(N=20)	4	16	9	11	8	12	14	6
The Big Switch	(N=24)	9	15	15	9	7	17	18	6
How to Get A'head'	(N=20)	5	15	12	8	9	11	12	8
Penetration 2	(N=21)	4	17	11	10	7	14	17	4
Nothing in Common Control Film	(N=19)	5	14	9	10	11	8	12	7
Total	(N=129)	31	98	71	58	49	80	90	39

Table 4

Film Evaluation Project Questionnaire

Please answer each of the questions below as best as you can. Any answer which you give will be completely *anonymous*. In other words, no one will ever know what answer you gave to any of the questions. If you have any questions about any particular item please ask one of the staff members for assistance.

1. How long have you lived in Mecklenburg County?

19 Years 3.3 Months

2. Do you subscribe to any newspapers?

70% Yes 30% No

If yes, which newspapers? ________________

3. How many movies on video cassette have you seen during the last 12 months, either in your home or elsewhere?

I have seen about 37.2 video's during the past 12 months.

4. Is your television currently connected to cable service?

76% Yes 24% No

5. Do you consider yourself to be a Democrat, Republican, Independent or something else?

52% Democrat
35% Republican
12% Independent
2% Other

6. How would you describe your attitudes on most political issues?

4% Very Conservative
48% Conservative
41% Liberal
2% Very Liberal
5% Other. Please specify ____________________________

7. How religious would you consider yourself to be?

20% Very religious
64% Somewhat religious
13% Not very religious
2% Not at all religious

8. How often would you say you attend religious services?

28% Weekly or more
24% Once or twice a month
29% Several times a year
14% Almost never
5% Never

9. There has been considerable discussion about amending the U.S. Constitution with an Equal Rights Amendment for women. Do you favor or oppose such an Amendment?

67% Favor
16% Oppose
17% No opinion

10. Have standards changed *in your community in recent years* so that the showing of nudity and sexual activities in movies, videocassettes and magazines, available to adults only, is *more* or *less* acceptable?

59% More acceptable
41% Less acceptable

11. Are movies, videocassettes and magazines which show nudity and sex *more* or *less* acceptable than those which show violence and killing?

49% More acceptable
51% Less acceptable

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, including sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.

12. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Tolerated 1 2 3 4 5 6 7 8 Not Tolerated

Mean = 4.03 61% Had Scores Between 1-4

13. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Definitely **Yes** 1 2 3 4 5 6 7 8 Definitely **No**

Mean = 2.93 73% Had Scores Between 1-4

14. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely **Yes** 1 2 3 4 5 6 7 8 Definitely **No**

Mean = 4.95 45% Had Scores Between 1-4

Finally, we need to ask you a few questions to help us compare results.

15. What was the highest grade or year of regular school or college you completed and received credit for?

2% Grade school (0-8 years).
8% Some high school (9-11 years).
23% High School Graduate (12 years).

33% Some college or technical school (13-15 years).
23% College Graduate (16 years).
11% Post graduate study (17 years or more).

16. What was your age on your last birthday?

I was 37.09 years old.

17. Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?

55% Protestant.
2% Jewish.
16% Catholic.
28% Other. Please Specify ____________________

18. Are you married, widowed, divorced, separated, or have you never been married?

54% Married
1% Widowed
16% Divorced
5% Separated
24% Never married

19. Is your race Black, White, Hispanic, Oriental or some other?

24% Black
74% White
1% Hispanic
0% Oriental
1% Other

20. Which of the following categories includes the total income for everyone in your household last year?

5% Under $10,000
17% $10,000 to $19,999
26% $20,000 to $29,999
19% $30,000 to $39,999
13% $40,000 to $49,000
20% $50,000 or more.

Table 4a

Film Evaluation Project Questionnaire

Please answer each of the questions below as best as you can. Any answer which you give will be completely *anonymous.* In other words, no one will ever now what answer you gave to any of the questions. If you have any questions about any particular item please ask one of the staff members for assistance.

1. How long have you lived in Mecklenburg County?

18 Years 3.7 Months

2. Do you subscribe to any newspapers?

70% Yes 30% No

If yes, which newspapers? ________________

3. How many movies on video cassette have you seen during the last 12 months, either in your home or elsewhere?

I have seen about 24.0 video's during the past 12 months.

4. Is your television currently connected to cable service?

86% Yes 14% No

5. Do you consider yourself to be a Democrat, Republican, Independent or something else?

61% Democrat
37% Republican
2% Independent
0% Other

6. How would you describe your attitudes on most political issues?

2% Very Conservative
43% Conservative
48% Liberal
0% Very Liberal
7% Other. Please specify ______________________________

7. How religious would you consider yourself to be?

18% Very religious
64% Somewhat religious
18% Not very religious
0% Not at all religious

8. How often would you say you attend religious services?

23% Weekly or more
27% Once or twice a month
32% Several times a year
14% Almost never
5% Never

9. There has been considerable discussion about amending the U.S. Constitution with an Equal Rights Amendment for women. Do you favor or oppose such an Amendment?

77% Favor
11% Oppose
11% No opinion

10. Have standards changed *in your community in recent years* so that the showing of nudity and sexual activities in movies, videocassettes and magazines, available to adults only, is *more* or *less* acceptable?

52% More acceptable
48% Less acceptable

11. Are movies, videocassettes and magazines which show nudity and sex *more* or *less* acceptable than those which show violence and killing?

48% More acceptable
50% Less acceptable
2% No response

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult material include: nude bodies and close-up graphic depictions of a variety of sexual activities, including sexual intercourse, ejaculation, bondage, oral sex, anal sex, group sex and variations of these acts by adult performers.

12. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Tolerated 1 2 3 4 5 6 7 8 **Not Tolerated**

Mean = 4.02 52% Had Scores Between 1-4

13. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Mean = 2.97 73% Had Scores Between 1-4

14. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Definitely Yes 1 2 3 4 5 6 7 8 Definitely No

Mean = 4.58 50% Had Scores Between 1-4

Finally, we need to ask you a few questions to help us compare results.

15. What was the highest grade or year of regular school or college you completed and received credit for?

2% Grade school (0-8 years).
5% Some high school (9-11 years).
25% High School Graduate (12 years).
39% Some college or technical school (13-15 years).
16% College Graduate (16 years).
14% Post graduate study (17 years or more).

16. What was your age on your last birthday?

I was 34.47 years old.

17. Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?

59% Protestant.
5% Jewish.
7% Catholic.
28% Other. Please Specify ______________________

18. Are you married, widowed, divorced, separated, or have you never been married?

59% Married
2% Widowed
7% Divorced
5% Separated
27% Never married

19. Is your race Black, White, Hispanic, Oriental or some other?

30% Black
68% White
0% Hispanic
0% Oriental
2% Other

20. Which of the following categories includes the total income for everyone in your household last year?

5% Under $10,000
16% $10,000 to $19,999
27% $20,000 to $29,999
23% $30,000 to $39,999
9% $40,000 to $49,000
20% $50,000 or more.

Table 5

Comparison of 1987 Survey with Current Study on Issues of Tolerance, Right to View Materials, and Appeal to Shameful and Morbid Interest in Sex

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

	1987 Survey	Before Film	After Film
Tolerated	42%	61%	56%
Not Tolerated	58%	39%	44%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

	1987 Survey	Before Film	After Film
Definitely Yes	69%	73%	75%
Definitely No	31%	27%	25%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

	1987 Survey	Before Film	After Film
Definitely Yes	20%	45%	19%
Definitely No	80%	55%	81%

Table 5a

Comparison of 1987 Survey with Current Study on Issues of Tolerance, Right to View Materials, and Appeal to Shameful and Morbid Interest in Sex (*Cumshot Review Volume Four* and *The Big Switch* Only)

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

	1987 Survey	Before Film	After Film
Tolerated	42%	52%	57%
Not Tolerated	58%	48%	43%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

	1987 Survey	Before Film	After Film
Definitely Yes	69%	73%	73%
Definitely No	31%	27%	27%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

	1987 Survey	Before Film	After Film
Definitely Yes	20%	50%	18%
Definitely No	80%	50%	82%

Table 6

Individuals Attitudes about Tolerance, Right to View Materials, and Appeal to Morbid or Shameful Interest in Sex Before Viewing the Film and After Viewing Film

Film Codes: Unnatural = Unnatural Phenomenon
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Percent Yes for Tolerated

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	60%	45%	63%	65%	62%	74%
After	60%	55%	58%	40%	48%	74%

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Percent Yes

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	80%	70%	75%	70%	76%	63%
After	92%	75%	71%	75%	76%	58%

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Percent Yes

	Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
Before	32%	50%	54%	45%	38%	53%
After	12%	10%	25%	10%	24%	37%

Table 6a

Individuals Attitudes about Tolerance, Right to View Materials, and Appeal to Morbid or Shameful Interest in Sex Before Viewing the Film and After Viewing Film (*Cumshot Revue Volume Four* and *The Big Switch* Only)

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing nudity and sex if they want to?

Percent Yes for Tolerated

	Cumshot Revue Volume Four	The Big Switch
Before	45%	63%
After	55%	58%

---

2. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you want to?

Percent Yes

	Cumshot Revue Volume Four	The Big Switch
Before	70%	75%
After	75%	71%

---

3. Some adult movies, videocassettes and magazines show actual sex acts in great detail and with close-ups of sexual organs. Would viewing this type of material appeal to an unhealthy, shameful or morbid interest in sex?

Percent Yes

	Cumshot Revue Volume Four	The Big Switch
Before	50%	54%
After	10%	25%

Table 7

Individuals Attitudes About the Film Which They Viewed

Film Codes:
Unnatural = Unnatural Phenomenon
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

---

1. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Percent yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
16%	35%	33%	10%	23%	0%

2. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
84%	65%	79%	70%	71%	100%

3. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Percent yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
96%	90%	71%	90%	95%	Not Asked

4. Do your believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
24%	20%	25%	20%	29%	Not Asked

5. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Unnatural	Cum Shot	Big Switch	Head	Penetration	Control
60%	40%	42%	35%	57%	Not Asked

Table 7a

Individuals Attitudes About the Film Which They Viewed (*Cumshot Review Volume Four* and *The Big Switch* Only)

---

1. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
35%	33%

---

2. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
65%	79%

---

3. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Percent Yes

Cumshot Revue Volume Four	The Big Switch
90%	71%

4. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Cumshot Revue Volume Four
The Big Switch

20%
25%

---

5. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Cumshot Revue Volume Four
The Big Switch

40%
42%

Table 8

Post Questionnaire Responses for Individuals Who Viewed Only the Five X-Rated Films

---

1. Do you think the federal or state government has the right to keep an adult who chooses to own a gun from having one in his or her own home?

Yes 24%

---

2. Do you believe that people with certain religious beliefs *should* have the right to determine what others have available to read or view?

Yes 14%

---

3. Do you think that the federal or state government *should* have the right to keep an adult from reading or viewing what he or she wants to read or view?

Yes 36%

---

4. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Yes 24%

---

5. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Yes 75%

---

6. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Yes 88%

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

---

7. Have you ever viewed a film or video like the one you just saw?

Yes 75%

If you answered Yes, about how many times in the last 5 years?

Average = 9.5

---

8. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at east about sex?

Yes 47%

---

9. Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 53%

---

10. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Yes 78%

---

11. Did your viewing this X-rated video appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Yes 16%

---

12. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Yes 24%

Table 8a

Post Questionnaire Responses for Individuals Who Viewed Only the Two X-Rated Films (*Cumshot Review Volume Four* and *The Big Switch*)

---

1. Do you think the federal or state government has the right to keep an adult who chooses to own a gun from having one in his or her own home?

Yes 36%

---

2. Do you believe that people with certain religious beliefs *should* have the right to determine what others have available to read or view?

Yes 16%

---

3. Do you think that the federal or state government *should* have the right to keep an adult from reading or viewing what he or she wants to read or view?

Yes 34%

---

4. If you were at your neighborhood video store and your neighbor checked out the video you viewed today, would you think there was something wrong with your neighbor?

Yes 34%

---

5. Do you think your neighbor, or you if you wanted to do so, *should* be free to choose to rent the movie you viewed today?

Yes 73%

---

6. Was the movie you saw today what you expected to see given this definition of X-rated videos, adult movies and magazines?

Yes 80%

The next few questions deal *only* with the X-rated video which you saw today. The scenes you saw in this film may have included nude bodies and close-up graphic depictions of a variety of sexual activities, including: sexual intercourse, ejaculation, oral sex, anal sex, group sex and variations of these acts by adult performers.

---

7. Have you ever viewed a film or video like the one you just saw?

Yes 66%

If you answered Yes, about how many times in the last 5 years?

Average = 6.2

---

8. Do you think that the film you just saw could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at east about sex?

Yes 41%

---

9. Do you think it *is* or *is not* tolerated in your community for the average adult to see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

Tolerated 57%

10. Do you believe you *should* be able to see any such showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

Yes 73%

11. Did your viewing this X-rated video appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Yes 18%

12. Do you believe that your neighbor's viewing of this type of material would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Yes 23%

Table 9

Individuals Attitudes about the Magazine (*Pregnant and Sexy*): Overall Percentages and Percentages as a Function of the Film Which They Viewed

Film Codes: **Unnatural = Unnatural Phenomenon**
Cum Shot = Cumshot Review Volume Four
Big Switch = The Big Switch
Head = How to Get A'head'
Penetration = Penetration 2
Control = Nothing in Common

---

1. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult magazines showing such nudity and sex if they should want to?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
50%	56%	50%	54%	45%	43%

---

2. Do you believe *you should* be able to see any such showing of actual sex acts in magazines if you should want to?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
74%	84%	65%	75%	70%	71%

3. Did viewing the material in this magazine appeal to any unhealthy, shameful or morbid interest in sex that you might have?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
22%	16%	20%	12%	30%	33%

4. Do you believe that your neighbor's viewing of this type of magazine would appeal to any unhealthy, shameful or morbid interest in sex that he or she might have?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
32%	28%	30%	33%	35%	33%

5. Do you think that the magazine you just examined could be used by a medical professional to help a married couple who needed marital sexual therapy feel more at ease about sex?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
51%	60%	45%	54%	50%	43%

---

6. Have you ever viewed a magazine like the one you just saw?

Percent Yes

Total	Unnatural	Cum Shot	Big Switch	Head	Penetration
45%	48%	40%	50%	45%	43%

If you answered Yes, about how many in the last 5 years?

Mean = 3.7

Appendix 3

The Random Digit Dial Survey of Mecklenburg County, North Carolina - 1987

CONDUCTED BY:
Joseph E. Scott

TYPE SURVEY:
Random Digit Dialing Super A

NUMBERS PROVIDED BY:
Survey Sampling, Inc.
Fairfield, Connecticut

INTERVIEWING BY:
Boroughs Research
2117 McClintock Road
Charlotte, North Carolina

BRIEFING:
July 7th, 1987

INTERVIEWING DATES:
July 7th - July 16th, 1987

Interviewers:	12
Sex:	10 Females, 2 Males
Race:	4 Blacks, 8 Whites
Age:	19-45, Median 29 Years of Age
Experience:	4 Mo.-5 Years, Median 6 months

VERIFICATION
July 11, 1987 and July 27th, 1987

TOTAL NUMBERS USED:	2,290	
TOTAL DIALINGS	4,675	
NONWORKING NUMBERS:	658	
NO ANSWERS	399	
BUSINESSES	261	
NOT ELIGIBLE	105	
SUB TOTAL	1,423	
HOUSEHOLDS	875	
Language Problem	35	4.0%
Busy	38	4.3%
Answering Machine	62	7.1%
Call Back	71	8.1%
Refusals	246	28.1%
Terminations*	16	1.8%
Completed	407	46.5%

---

* Of the 16 terminations, 11 terminated before question 15.

A random telephone sample of households in Mecklenburg County, North Carolina was conducted. The actual interviewing began on July 7th, 1987, and was completed on the 16th of July, 1987.

The firm Boroughs Research of Charlotte, North Carolina was used as the interviewing organization. They have an impressive history of survey research work over the last several years, including clients such as the Gallup Poll, North Carolina Charlotte, the Charlotte Chamber of Commerce and several large national companies.

The interview form was reviewed with their president, Dorothy Boroughs on July 4th and again with their president and office manager, Susan Martin, on July 7th, 1987. They were informed at that time that I wanted a random household sample of adults in Mecklenburg County (one-half screened by next birthday). The sample completed was to be a minimal 400 adults.

I purchased a random digit telephone sample for the county from Survey Sampling, Inc. of Fairfield, Connecticut. Survey Sampling, Inc. is one of the most, if not the most, prestigious organization in the country in developing random samples. They calculated that 93.0 percent of the households in Mecklenburg County have telephones but that only 77.8 percent have listed numbers. To obtain accurate estimates of telephone households by county, Survey Sampling has developed a special data base beginning with the 1980 census data for residential telephone incidence. These counts are updated yearly with data on new telephone installations provided at the state level and then applied to current projections of households by county, published annually by Sales and Marketing Management Magazine.

After a geographic area has been defined as the target, the sum of estimated telephone households is calculated and divided by the desired sample size to produce a sampling interval.

EXAMPLE: (Total estimated telephone households) 156,712

(Desired sample size) 400

INTERVAL = 392

A random number between 392 is then drawn to establish a starting point. Assuming the starting point is 10, then the 10th number, the 402nd number, the 794th number, the 1,186th number and etc. would be selected for the sample, each time stepping through the data base by a factor of 392. This is a systematic random sample – as the sample is selected in a systematic "nth" fashion from a random starting point.

SELECTION OF NUMBERS AND EXCHANGES

One or more unique telephone numbers is selected by systematic sampling from among all working blocks of numbers in all telephone exchanges assigned to the county. A working block is defined as 100 contiguous numbers containing three or more residential telephone listings.

EXAMPLE: The phone number	3 5 8	3 5 9 0
	Exchange	Block

In this example, the exchange 358, the entire block comprises the numbers 3500-3599. Next from a random start those exchanges and working blocks falling within the interval are sampled on a systematic basis. For the random digit sample, two or more digits randomly chosen from the range 00-99 are added to each of the blocks selected. The result is a complete number made up of the exchange, the block and the two random digits.

To put it in more simple language, the sample used was random, allowing each household to have an equal opportunity of being contacted whether their number was unlisted, newly installed and not yet in the directory or whatever.

THE SURVEY STAFF

On July 7th, 1987, the survey staff of Boroughs Research was given the questionnaire and briefed on the procedures to follow. Each of them practiced administering the questionnaire to one another under observation by myself, the President and office manager before they were allowed to begin the interviewing. They did all calls from the central facility at Boroughs and had a supervisor present at all times listening and observing. I observed interviewing from the 7th-through 11th personally.

They were not informed as to what or whom the survey was for nor as to its purpose (to avoid any bias). There were 12 interviewers on the project: 2 males and 10 females; 4 blacks and 8 whites; with the youngest 19 years old and the oldest 45 years old and the median age being 29 years of age. The minimal interviewing experience of any interviewers was 4 months and the maximal 5 years with the median being 6 months experience. They completed 407 interviews in Mecklenburg County. The refusal rate for the interviews was well within state of the art parameters (11.4 percent if calculated by the numbers used divided into refusals; or 29.9% if calculated by the eligible household numbers divided into refusals and terminations; or 39.2% if calculated by refusals + terminations divided by completions + refusals + terminations.

SURVEY RESULTS

4.	How long have you lived in Mecklenburg County?	Range	1-85 Years	
		1-7 Years	129	32.1%
		8-24 Yrs	135	33.6%
		25-85 Yrs	138	34.3%
5.	I'd like to briefly talk about media. Do you subscribe to any newspaper?	Yes	288	70.8%
		No	119	29.2%
6.	Is your television currently connected to a cable service?	Yes	274	67.5%
		No	132	32.5%
7.	How many movies on video cassettes have you seen in the last year?	None	101	25.7%
		1-12	146	37.2%
		13-99	146	37.2%
8.	Are you for or against Jim and Tammy Baker regaining control of the PTL Ministry?	Favor	62	20.1%
		Neutral	55	17.9%
		Oppose	191	62.0%
9.	Should or should not teenagers be able to buy any type of music they desire?	Should	215	58.6%
		Should not	152	41.4%
10.	Do you favor or oppose the government requiring the rating of rock music records and albums?	Yes favor	257	66.2%
		No oppose	131	33.8%

11. On a different matter, do you consider yourself to be Republican Democrat, Independent or other?	Repub.	147	37.1%
	Democrat	135	34.1
	Indep.	85	21.5%
	Other	29	7.3%
12. Would you describe your attitudes on most political issues as very conservative, conservative, liberal or very liberal?	Very Cons.	29	7.5%
	Conservat.	191	49.2%
	Moderate	51	13.1%
	Liberal	106	27.3%
	Very Lib.	11	2.8%
13. Would you consider yourself to be *very* religious, *somewhat* religious, *not very* religious, or *not* religious at all?	Very rel.	141	34.7%
	Somewhat	224	55.2%
	Not very	31	7.6%
	Not at all	10	2.5%
14. How often would you say you attend religious services – every week or more, once or twice a month, a few times a year, almost never or never?	Weekly +	166	41.2%
	1-2 a mon.	112	27.8%
	Sev. yr.	77	19.1%
	Almost nev.	36	8.9%
	Never	12	3.0%
15. Do you think the U.S. Constitution *should* or *should not* be amended with an Equal Rights Amendment?	Should	272	75.6%
	Should not	88	24.4%
16. Have standards changed in your community recently making the showing of nudity and sexual activities in movies, video cassettes and magazines, available to adults more or less acceptable?	More accep.	182	50.8%
	Equally	27	7.5%
	Less accep.	149	41.6%
17. Are movies, video cassettes and magazines which show nudity and sex more or less acceptable than those which show violence and killing?	More	141	38.6%
	Equal	85	23.3%
	Less	139	38.1%

The next few questions deal with X-rated videos, and adult movies and magazines. The nudity and sex shown in these types of adult materials include: nude bodies and close-up graphic

depictions of a variety of sexual activities, including: sexual intercourse, oral sex, anal sex, group sex and variations of these acts by adult performers.

18.	Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, videos, and magazines?	Yes-Tol.	156	42.7%
		Not-Tol.	209	57.3%
19.	Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines?	Yes	265	69.0%
		No	119	31.0%
20.	Some adult movies, video cassettes and magazines show actual sex acts in detail and with close-ups of the sexual organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?	Yes	71	20.5%
		No	275	79.5%
21.	What was the highest grade or year of regular school or college completed and received a grade for?	0-8 Yrs.	7	1.7%
		9-11 Yrs.	32	7.9%
		12 Yrs.	100	24.6%
		13-15 Yrs.	137	33.7%
		16 Yrs.	103	25.4%
		17+ Yrs.	27	6.7%
22.	What was your age on your last birthday?	18-29	133	33.9%
		30-49	159	40.6%
		50+	100	25.5%
23.	How many people live in this household?	1	51	12.5%
		2	151	37.1%
		3+	223	49.9%
24.	How many adults, 18 years or older live in the household?	1	68	16.7%
		2	255	62.8%
		3-5	83	20.4%

25.	Do you consider yourself to be Protestant, Jewish, Catholic or some other faith?	Protes.	253	62.9%
		Jewish	8	2.0%
		Cath.	40	10.0%
		Other	101	25.1%
26.	Are you now married, widowed, divorced, separated, or have you never been married?	Married	225	55.4%
		Widow	28	6.9%
		Divorce	34	8.4%
		Separ	22	5.4%
		Nev. Mar.	97	23.9%
27.	Is your race white, black, hispanic, oriental or other?	White	315	77.8%
		Black	82	20.2%
		Hispanic	1	0.2%
		Other	7	1.7%
28.	Which of the following categories includes the total income for everyone in the household?	<$ 10,000	31	8.4%
		10-19,999	58	15.6%
		20-29,999	88	23.7%
		30-39,999	77	20.8%
		40-49,999	35	9.4%
		$ 50 or >+	82	22.1%
29.	Do you favor or oppose having a law in North Carolina that would permit a wife to accuse her husband of rape?	Favor	279	76.9%
		Oppose	84	23.1%
30.	Which of the following statements comes closest to your opinion about what should happen to a man who with the use of physical force or threat of such force has sexual relations with his wife?	10 Years	67	18.0%
		1-2 Years	49	13.1%
		Few Months	30	8.0%
		Counselling	128	34.3%
		Grounds Div.	55	14.7%
		Nothing	44	11.8%
31.	Which of the following statements comes closest to your opinion about what should happen to a man who with the use of physical force or threat of such force has sexual relations wit his date?	10 Years	163	44.5%
		1-2 Years	84	23.0%
		Few Months	29	7.9%
		Counselling	53	14.5%
		Civil	23	6.3%
		Nothing	14	3.8%

32.	Sex	Male	187	45.9%
		Female	220	54.1%
36.	Call Interview Completed	1st	234	57.5%
		2-4th	173	42.5%
37.	Conversion	Yes	44	10.8%
		No	363	89.2%
40.	Screen Birthday	Yes	207	50.9%
		No	200	49.1%

COMMUNITY STANDARDS MECKLENBURG, NORTH CAROLINA

THE NEXT FEW QUESTIONS DEAL WITH X-RATED VIDEOS, AND ADULT MOVIES, AND MAGAZINES. THE NUDITY AND SEX SHOWN IN THESE TYPES OF ADULT MATERIALS INCLUDE NUDE BODIES AND CLOSE-UP GRAPHIC DEPICTIONS OF A VARIETY OF SEXUAL ACTIVITIES, INCLUDING: SEXUAL INTERCOURSE, ORAL SEX, ANAL SEX, GROUP SEX AND VARIATIONS OF THESE ACTS BY ADULT PERFORMERS.

18. Do you think it *is* or *is not* tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

TOLERATED	NOT TOLERATED	
42.7%	57.3%	
38.3%	51.4%	10.3% (DK/NA)

19. Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

SHOULD	SHOULD NOT	
69.0%	31.0%	
65.1%	29.2%	5.7%(DK/NA)

20. Some adult movies, video cassettes and magazines show actual sex acts in great detail and with close-ups of the sexual

organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?

APPEAL	NOT APPEAL	
20.5%	79.5%	
17.4%	67.6%	15.0%(DK/NA)

SUMMARY OF RANDOM DIGIT DIAL SURVEY OF MECKLENBURG CO., N.C. KEY QUESTIONS

QUESTION #18

Do you think it is or is not tolerated in your community for the average adult to obtain and see adult movies, video cassettes and magazines showing such nudity and sex if they should want to?

	TOLER.	NOT TOL.	DK/NA	NUMBER
ALL	42.7%	57.3%		365
ALL	38.3%	51.4%	10.3%	407
CONVERSION-Yes	50.0%	50.0%		38
CONVERSION-No	41.9%	58.1%		327
SCREEN B.D.-Yes	44.5%	55.5%		182
SCREEN B.D.-No	41.0%	59.0%		183

The response to this question indicated that the majority of respondents perceived that it was not tolerated in their community for the average adult to obtain and see adult material if they should want to. Forty-two percent (42.7%) of the respondents said it was tolerated while 57.3% indicated it was not.

EXAMINING BY 51 SUBGROUPS

In analyzing this question for the 51 subgroups, 10 of the 51 agreed that it is alright to obtain and view adult material, however, the majority of subgroups (41 of the 51) did not think it was tolerated in their community for the average adult to obtain and see adult material. The range of responses to this question by subgroup varied from a low of 31.3% for those indicating they had not viewed a video cassette in the last year and 34.2% for those who indicated they attend religious service weekly or more to a high of 56.2% for those who indicated that their political preference was independent or other.

QUESTION #19

Do you believe *you should* or *should not* be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if you should want to?

	SHOULD	SHOULD NOT	DK/NA	NUMBER
ALL	69.0%	31.0%		384
ALL	65.1%	29.2%	5.7%	407
CONVERSION-Yes	56.1%	43.9%		41
CONVERSION-No	70.6%	29.4%		343
SCREEN B.D.-Yes	66.9%	30.1%		193
SCREEN B.D.-No	68.1%	31.9%		191

The overwhelming majority of respondents indicated that they believed they should be able to see any showing of actual sex acts in adult movies, video cassettes, or magazines if they should want to (69.0%).

EXAMINING BY 51 SUBGROUPS

In examining the results [sic] this question for the 51 subgroups, 50 of the 51 indicated that they should be able to see any showing of sex acts in movies, videos or magazines if they should want to. The range of responses to this question varied from a high of 90% of those indicated they are not very or not at all religious, and 84.1% of those who indicated that their political orientation was either liberal or very liberal to a low of 36.0% of those individuals 50 years of age or over.

QUESTION #20

Some adult movies, video cassettes and magazines show actual sex acts in great detail and with close-ups of the sexual organs. Would viewing this type of material appeal to your unhealthy, shameful or morbid interest in sex?

	APPEAL	NOT APPEAL.	DK/NA	NUMBER
ALL	20.5%	79.5%		346
ALL	17.4%	67.6%	15.0%	407
CONVERSION-Yes	27.0%	73.0%		37
CONVERSION-No	19.7%	80.3%		309
SCREEN B.D.-Yes	15.9%	84.1%		170
SCREEN B.D.-No	25.0%	75.0%		176

The overwhelming majority of respondents indicated that viewing sexual material would not appeal to their "prurient" interest in sex. Only 20.5% of the respondents indicated that viewing such material would have this effect on them while 79.5% indicated that it would not.

EXAMINING BY 51 SUBGROUPS

In examining this question for the 51 subgroups, in not one of them did a majority of respondents indicate that viewing sexually explicit material would it appeal to their "prurient" interest in sex. The responses ranged from a low of 12.8% for those who were 50 years of age or over to a high of 28.2% for those indicating that their total household income was less than $20,000 per year.

APPENDIX H

TRIAL TRANSCRIPT:

[p. 873] THE COURT: Well, in this case, it took two days to select a jury. There were 18 challenges on each side, and in a day and a half or two days, I have heard from all of the [p. 874] expert witnesses that the defendants may call, and I have heard it in its entirety and have taken careful notes. The testimony of the expert witnesses collectively speaks to at least one of the issues that the jury is going to have to answer in this case. Of course, books have been written about at what point does an expert invade the province of the jury. There have been books written on both sides about it. Ultimately, the burden rests with the Trial Judge to determine whether or not under 702 he feels that this expert testimony would be of some assistance to the jury in making its determination, and in that, as *Anderson* has said, and many other cases, as far as I know it's always been the law in North Carolina. In that instance, the law affords the Trial Judge broad discretion. So let the record show that I have heard all of the proffered expert testimony from the defendants in the case, and I have carefully considered it. That based upon that collective expert testimony, the Court makes a finding under Rule 403 that any probative value such evidence might have would be substantially outweighed by the danger of confusion of the issues or danger of misleading the jury. The Court further finds under Rule 702 that the expert testimony would not be of any assistance, yea [sic] would probably confuse the jury, in reaching the determinations that it has to reach in this case, and I'm going to exclude all of the expert testimony from the defendants.

APPENDIX I

[p. 878] MR. CASSTEVENS [defense counsel]: . . . I don't know what evidence is more illuminating for the jury to consider that we could have possibly generated, than for them to view the boxes, to consider what has happened and what Defendant's Exhibit 5 shows, to look at Defendant's Exhibit 4, to determine for themselves how many [p. 879] residents reside in Mecklenburg County and how many times they've rented it.

THE COURT: I'm not going to allow it for the reasons I've already stated, Mr. Casstevens.

MR. CASSTEVENS: All right.

THE COURT: The jury has seen every one of these films these people have been indicted with, and the magazine.

MR. CASSTEVENS: I understand that.

THE COURT: I don't know of anything that could be more – that could tell you any more than what the jury has seen as to what they've been indicted for. They've seen every one of them.

MR. CASSTEVENS: I understand, Your Honor, but the issue of this case is whether the average citizen, applying contemporary community standards, finds this material patently offensive, and the number of people who watch it, the number of times it has been rented, the wide distribution of the people who view it, goes to whether or not there is community acceptance of this material and whether or not it is patently offensive or whether or not it appeals to the prurient interest. Its acceptability in the community is a test that enables the defendant to show that the State has not proved that it's offensive to the contemporary community standards.

THE COURT: I'm not going to allow it for the reasons I've already stated.

[p. 880] MR. CASSTEVENS: Well, we – I guess I don't need to make a record other than what we've told the Court we're going to do.

THE COURT: You're free to make whatever record you want right now.

MR. CASSTEVENS: Judge, for the record, let me make it explicit what we're going to do so you, for the record, can –

THE COURT: I thought it was pretty clear that you'd already stated why you wanted to use it, but you may go ahead.

MR. CASSTEVENS: I'm going to try to do it even clearer.

THE COURT: All right.

MR. CASSTEVENS: What we propose to do at this time is call Dr. Scott, who has already testified that he has viewed 98 of the movies, videos, that are listed on Defendant's Exhibit 5. That Dr. Scott has already testified that the 98 which he had viewed listed on Defendant's Exhibit 5 are similar, in that all of them contain graphic depictions of sexual acts between adults, consisting of vaginal intercourse, anal intercourse, oral sex, masturbation, group sex, and bi-sexual conduct, and have him testify that in his opinion, that it's similar. The next thing we would have him do is look at the video, mark it as a defendant's exhibit, move for its introduction, and ask that that video box with the video contained in it be passed to the jury. In addition to that, I would [p. 881] like to move at this time that the jury be allowed to watch three representative samples of the top 100. I think we've identified them earlier as what – 13-C, which would be "Honey Buns"; Defendant's Exhibit 13-D, which would be "Screaming Rage"; Defendant's Exhibit 13-E, which would be "Reamin Reunion." And that would be, Your Honor, what we would propose to do.

THE COURT: All right. The Court is going to deny that for the reason already stated under Rule 702 and Rule 403, the basis for the finding being both the individual and collective testimony of the expert witnesses produced by the defendant on voir dire. Further, with respect to the three films that you want to show, that's denied on the grounds that it would be cumulative of what the jury has already seen.

MR. CASSTEVENS: I want to make it clear, Your Honor, that the offer of Dr. Scott is – I am not offering him as an expert. I am offering him as an individual, without using his expertise, who has personal knowledge of the contents of these materials, and having viewed them, not as an expert, but as a person. And so he is not being offered as an expert. He is only being offered as someone who has seen the material for which we have been indicted, and for –

THE COURT: Well, then, he stands in the shoes of a juror who's already seen the films that the defendants have been indicted for.

[p. 882] MR. CASSTEVENS: I understand that, and I've already articulated my position about the fact that these are similar materials with the acceptance in the community under *Womack*, and it is our position we are entitled to introduce them.

THE COURT: All right. That request is denied for the reasons stated. It would be cumulative.

* * *

APPENDIX J

SUBMISSION OF PROPOSED JURY INSTRUCTION REGARDING DEVIANT MATERIAL – 88CRS46966, 46970, 46973, 36976 [sic], 46979, 46983, 49698, 69859, 88CRS62471, 62472, 62474, 62475, 62476, 62477, 62478, 62839, 69840, 69844, 69846, 69849, 69853, 88CRS65318, 65319, 65320, 65321, 65322, 65323, 65324, 65325 – (Filed December 20, 1988)

Defendants previously requested by motion that this Honorable Court review the material that is the subject matter of the instant obscenity prosecutions and, consistent with the United States Supreme Court holding in *Mishkin v. New York*, 383 U.S. 502, 16 L.Ed. 2d 56, 86 S. Ct. 958 (1966); reh. den. 384 U.S. 934, 16 L.Ed. 2d 535, 86 S.Ct. 1440, give a specific "deviant" instruction that particular material deemed "deviant" be required to appeal to the "prurient interest of the average member of the deviant group to whom the intended and probable recipient of the material was".

This Honorable Court, in furtherance of the motion brought by Defendants requested that Defendants submit a proposed deviant instruction for review by this Honorable Court. Accordingly, Defendants submit the attached proposed jury instruction. Defendants request that this Honorable Court rule on this request forthwith so as to allow Defendants ample opportunity to prepare their defense in this matter.

Respectfully submitted,

LEE J. KLEIN, P.C.
By: s/ Lee J. Klein
Lee J. Klein (P25186)
Attorney for Defendant
Cinema Blue of Charlotte, Inc.

CASSTEVENS, HANNER, GUNTER, AND GORDON
By: s/ Nelson Casstevens
Attorney for Defendant
Cinema Blue of Charlotte, Inc.

GEORGE DALY, P.A.
By: s/ George Daly
Attorney for Defendant
Jim St. John

CASEY, BISHOP, MURPHY, BUSH, AND CHAPMAN
By: s/ Calvin E. Murphy
Attorney for Defendant
Curtis Rene Peterson

I have previously instructed you that the "prurient interest" of each film and magazine must be judged in relation to the average person in your community. However, as to the film "Video Games Volume 10, Cum and Cum Again", you are instructed that the "prurient interest" must be measured by the average member of its intended and probable recipient group, that being as to this film only, the average homosexual in the community from which you come.

Defendants' Proposed J.I. #______
Given as J.I. #______

HOMOSEXUAL AUDIENCES

The obscenity law in North Carolina includes a requirement that material be judged with reference to the "average" adult or "ordinary" adult. However, where it appears from the character of the material itself that it was designed for or directed to a particular audience, you must judge this material with reference to this particular audience.

In the circumstances of this case, therefore, you will judge obscenity with reference to ordinary adults, except that it shall be judged with reference to homosexuals or other susceptible audiences if it appears from the character of the material or the circumstances of its dissemination to be especially designed for or directed to such homosexuals or audiences.

Objected to by: ______

		State	Defendant
Given			
Given as modified			
Not given	✓		